No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the Use of Westinghouse Electric Supply Company, WM. RADKOVICH COMPANY, INC., *et al.,*

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEES

ANDERSON, McPHARLIN & CONNERS,
458 South Spring Street,
Los Angeles 13, California,

Wm. Radkovich Company, Inc., a Corporation, United Pacific Insurance Company, a Corporation, General Casualty Company of America, a Corporation, Excess Insurance Company of America, a Corporation, Manufacturers' Casualty Insurance Company, a Corporation, Appellees.

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TOPICAL INDEX

PAGE

I.

Statement of the pleadings 1

II.

Jurisdiction of the District Court and the United States Court of Appeals 4

1. Jurisdiction of the District Court 4

2. Jurisdiction of the United States Court of Appeals 5

III.

Statement of facts 5

IV.

Introduction to argument 6

Argument 7

I.

The District Court had jurisdiction of the Radkovich cross-claim 7

A. The Radkovich cross-claim is ancillary to the principal action 7

B. The Radkovich cross-claim is authorized by Rule 13 10

(1) As to the issues involved 13

(2) The Radkovich claim versus Glens Falls is ancillary to the Westinghouse action 15

C. General provisions regarding ancillary jurisdiction 16

D. Ancillary jurisdiction in cases under Miller Act 19

E. The Radkovich cross-claim is directly authorized by the rules 24

PAGE

II.

Radkovich cross-claim states grounds upon which relief can be granted 30

A. Allegations of liability of Glens Falls 30

B. Radkovich could be allowed to recover under the performance bond 35

1. Performance of the subcontract 35

2. Performance of conditions precedent in performance bond 36

C. Radkovich has a right of recovery upon the payment bond 37

D. Any issues not raised by the pleadings were litigated so as to cure the defects in the pleadings as provided in Rule 15(b) 39

III.

Recovery by Radkovich can be predicated upon the payment bond 41

IV.

There was no material alteration of the subcontract such as would serve to exonerate appellant 46

B. There was no alteration of the subcontract by furnishing materials and doing work not within the subcontract 53

C. There were no premature payments under the subcontract such as would exonerate appellant 58

D. Any change in the method of payment did not amount to a material alteration of the subcontract 64

E. The findings of fact in regard to alteration of the subcontract are adequate 65

PAGE

V.

Judgment as based on performance bond 69

VI.

Compliance with conditions precedent as affecting recovery upon performance bond 70

VII.

Condition precedent of performance of subcontract 72

VIII.

Finding of Fact XVIII is supported by the evidence 73

IX.

Construing payment bond with performance bond 74

X.

The trial court's judgment against Glens Falls is supported by the record 76

Conclusion 77

TABLE OF AUTHORITIES CITED.

CASES PAGE

Alberts v. American Casualty Co., 88 Cal. App. 2d 891 ....38, 42, 43, 45

Anderson v. Federal Cartridge Corp., 156 F. 2d 681........45, 60, 73

Arizona Lead Mines v. Sullivan Mining Co., 3 F. R. D. 135........ 10

Bank of Nova Scotia v. San Miguel, 9 F. R. D. 171.................... 32

Bateman v. Mapel, 145 Cal. 241.. 63

Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Bornemeier, 13 F. R. D. 146...18, 26, 28, 38, 41

Blackwood v. McCallum, 187 Cal. 655....................................36, 52

Bond v. Holloway, 45 Cal. App. 634, 188 Pac. 577........................ 58

Bossard v. McGwinn, 27 Fed. Supp. 412.. 15

Bowman v. Maryland Cas. Co., 88 Cal. App. 481........47, 50, 52, 58

Brown v. First Nat. Bank v. Grimmett, 18 F. R. S. 14(a).52 Case 1 24

Ceremony v. Drummond, 37 Cal. App. 446................................38, 39

Chernow v. Cohn & Rosenberger, Inc., 5 Fed. Supp. 869............ 22

Coleman v. United States, 176 F. 2d 469...................................... 60

Dunne Inv. Co. v. Empire State Surety Co., 27 Cal. App. 208.... ....49, 58

Dworkin v. Spector Motor Service, 3 F. R. D. 340........................ 9

Erie R. R. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.. 28

Falcone v. City of N. Y., 2 F. R. D. 87.. 30

First Congregational Church v. Lowery, 175 Cal. 124, 165 Pac. 440 57

Gift v. Ahrnke, 107 Cal. App. 2d 614.. 48

Glens Falls Indemnity Co. v. Atlantic Building Corp., 199 F. 2d 60...25, 28, 38, 41

Glens Falls Indem. Co. v. Basich Bros. Const. Co., 165 F. 2d 649; cert. den., 68 S. Ct. 1347, 334 U. S. 833, 92 L. Ed. 1760 ....47, 71

PAGE

Grace Bros. v. C. I. R., 173 F. 2d 170 ... 60
Hazeltine Corp. v. Crosley Corp., 131 F. 2d 34 ... 68
Herrington v. Jones, 2 F. R. D. 108 ... 15, 17
Hess v. Factors Corp. of America, 80 Fed. Supp. 727 ... 32
Hoskie v. Prudential Ins. Co., etc., 39 Fed. Supp. 305 ... 15
Hunstock v. Royal Securities Corp., 51 Cal. App. 769, 197 Pac. 963 ... 58
Jack Mann Chevrolet Co. v. Associates Inv. Co., 125 F. 2d 778 ... 70
Jordan v. Stephens, 7 F. R. D. 140 ... 26, 30
Kelly v. Pa. Ry. Co., 7 F. R. D. 524 ... 17
Lamcon Co. Inc. v. Jones et al., 134 Cal. App. 89 ... 76
Lane Bryant, Inc. v. Maternity Lane, Ltd., of Cal., 173 F. 2d 559 ... 32
Lawrence v. Great Northern Ry. Co., 98 Fed. Supp. 746 ... 29
Lesnik v. Public Industrials Corporation, 144 F. 2d 968 ... 10
Maryland Casualty Co. v. Shafer, 57 Cal. App. 580 ... 75
McLouth Steel Corp. v. Mesta Machine Co. v. Hartford Accident & Indemnity Co., 17 F. R. S. 14a221, Case 1 ... 26, 38, 41
Miller v. Hano, 8 F. R. D. 67 ... 17, 18, 29
Millsap v. Lotz, 11 F. R. D. 161 ... 17, 18
Morrell v. United Air Lines Transp. Co., 29 Fed. Supp. 757 ... 15
National City Bank of New York v. Valldejuli Puig, 106 Fed. Supp. 1 ... 19
Norwich Union Indem. Co. v. Haas, 179 F. 2d 827 ... 68
O'Brien v. Richtarsic, 2 F. R. D. 42 ... 17
Pacific Coast Engineering v. Detroit Fidelity and Surety Co., 214 Cal. 384 ... 62, 63
Paramount Pest Control Service v. Brewer, 177 F. 2d 564 ... 73
Phillips v. Baker, 121 F. 2d 752; cert. den. 61 S. Ct. 301, 314 U. S. 688, 86 L. Ed. 551 ... 70
Rappa v. Pittston Stevedoring Corporation, 48 Fed. Supp. 911 ... 29

PAGE

Reed v. Hickey, 2 F. R. D. 92 .... 16, 17

Roberts v. Security Trust & Sav. Bank, 196 Cal. 557 .... 47, 49, 52

Saba v. Emil Katz & Co., 55 Fed. Supp. 1000 15

Schram v. Roney, 30 Fed. Supp. 458 21

Schwab v. Bridge, 27 Cal. App. 204 71

Seaboard Surety v. United States, 84 F. 2d 348 23

Seven-Up v. Cheer-Up Sales Co. of St. Louis, Mo., 148 F. 2d 909; cert. den., 66 S. Ct. 32, 326 U. S. 727, 90 L. Ed. 431 60

Sherman v. American Surety Co., 178 Cal. 286, 173 Pac. 161 71

Simpson v. Bergman, 125 Cal. App. 1, 13 P. 2d 531 58

Smith v. Thomsen, 8 Cal. App. 2d 603, 48 P. 2d 102 58

Standard Oil Co. v. Houser, 101 Cal. App. 2d 481 70

State Farm Mut. Auto Ins. Co. v. Koval, 146 F. 2d 118 70

State of Illinois v. Md. Cas. Co., 2 F. R. D. 241 29

Summerbell v. Weller, 110 Cal. App. 406 76

Sussan v. Strasser, 36 Fed. Supp. 266 .... 15, 17

Union Indemnity v. Lang, 71 F. 2d 901 71

United States v. Biggs, 46 Fed. Supp. 8 22

United States v. Foster, 123 F. 2d 32 .... 45, 60

United States v. John A. Johnson, 65 Fed. Supp. 514 21

United States v. Landis & Young, 16 Fed. Supp. 835 23

United States v. Maples, 6 Fed. Supp. 354 23

United States v. Ore. State Med. Soc., 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 928 68

United States v. Skilken, 53 Fed. Supp. 14 .... 20, 23

United States to the Use and Benefit of Foster-Wheeler Corp. v. Amer. Surety Co. of N. Y., 25 Fed. Supp. 700 .... 7, 23

PAGE

United States to the Use and Benefit of Par-Lock Appliers of N. Y. v. J. A. J. Const. Co., et al., 49 Fed. Supp. 85; affd., 137 F. 2d 584 .... 4, 8, 12

W. P. Fuller & Co. v. Alturas School Dist., 28 Cal. App. 609 50

Watkins v. Baltimore & O. R. Co., 29 Fed. Supp. 700 30

Williams v. Keyes, 125 F. 2d 208 19

Wingate v. Bercut, 146 F. 2d 725 60

Wolf v. Aetna Indemnity Co., 163 Cal. 597 .... 47, 52

Yap v. Ferguscon, 8 F. R. D. 166 29

Young v. Atl. Refining Co., 9 F. R. D. 491 30

Statutes

Civil Code, Sec. 2807 71

Civil Code, Sec. 2819 .... 46, 47, 48

Federal Rules of Civil Procedure, Rule 8(a) 9, 31, 33

Federal Rules of Civil Procedure, Rule 8(a)(2) 31

Federal Rules of Civil Procedure, Rule 8(f) 13, 32

Federal Rules of Civil Procedure, Rule 12(h) 41, 70

Federal Rules of Civil Procedure, Rule 13 22

Federal Rules of Civil Procedure, Rule 13(d) 23

Federal Rules of Civil Procedure, Rule 13(g) 4, 5, 9, 12, 22

Federal Rules of Civil Procedure, Rule 13(h) 16, 21

Federal Rules of Civil Procedure, Rule 14 .... 22, 29

Federal Rules of Civil Procedure, Rule 14(a) ....
4, 13, 15, 16, 23, 24, 25, 26, 29
33, 34, 37, 39, 41, 43, 45, 77

Federal Rules of Civil Procedure, Rule 15(b) 34, 39

Federal Rules of Civil Procedure, Rule 20(a) 12

Federal Rules of Civil Procedure, Rule 82 .... 16, 22

PAGE

United States Code Annotated, Title 28, Sec. 1291........................ 5

United States Code Annotated, Title 40, Sec. 270b...............1, 4, 8

United States Code Annotated, Title 40, Sec. 270b(a) 4, 7

United States Code Annotated, Title 40, Sec. 270b(b)................. 7

Textbooks

12 American Law Reports, p. 382.. 58

1 Barron & Holtzoff, Federal Practice and Procedure (Rules Ed.), p. 781.. 9

1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 424, p. 841.. 16

1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 424, p. 846.. 17

1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 426, p. 850.. 29

1 Barron & Holtzoff, Federal Practice and Procedure (Rules Ed.), Sec. 427, p. 865.. 9

1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 255, p. 431.. 31

1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 255, p. 434.. 32

2 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1131, p. 831...44, 59

2 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1133, p. 834.. 67

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vs.

United States of America, at the Relation of and the Use of Westinghouse Electric Supply Company, Wm. Radkovich Company, Inc., *et al.,*

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

I.

Statement of the Pleadings.

The action was commenced by the filing of a complaint by Westinghouse Electric Supply Company [R. 3] (hereinafter referred to as Westinghouse), with the United States of America as nominal plaintiff as authorized by 40 U. S. C. A. 270b, commonly known as the Miller Act. The defendants named in said action were E. B. Woolley (hereinafter referred to as Woolley), the subcontractor, Wm. Radkovich Company, Inc., the prime contractor (hereinafter referred to as Radkovich), and certain sure-

ties for Radkovich, whose names appear on page 3 of the record and who will hereinafter be referred to as Radkovich Sureties.

In the original complaint, Westinghouse alleged the existence of the prime contract, and the furnishing of supplies to Woolley who it was alleged was a subcontractor acting under Radkovich. Then was alleged the materials supplied by Westinghouse to Woolley, their value, and the fact that they actually went into the project.

All the defendants named answered, and in addition thereto a cross-claim was filed by Radkovich and his sureties against Woolley in which it was alleged that if cross-claimants were liable to Westinghouse in the principal action, then Woolley was in turn liable over to cross-claimants for like amount less any amount found to be due to Woolley.

Also named as a cross-defendant in the Radkovich cross-claim was the Glens Falls Indemnity Company (hereinafter referred to as Glens Falls). In all probability this should have been denominated as a third party complaint as it applied to Glens Falls, for the relief sought was that if Radkovich should be held liable to Westinghouse, that Glens Falls in turn would be liable to Radkovich under either of two bonds executed by Glens Falls, one a payment bond, and the other a performance bond. In each of these bonds Woolley was principal, Glens Falls was surety, and Radkovich was the obligee. Both Woolley and Glens Falls answered this cross-complaint.

In addition Woolley filed a cross-claim which was later amended against Radkovich and Radkovich Sureties in which the United States of America appears as nominal cross-complainant as in the principal action by Westinghouse. Radkovich and Radkovich Sureties answered this cross-complaint, which answer was adequate to cover the issues raised even after the cross-complaint was amended.

The pleadings presented to the court the entire controversy between these various parties arising out of the work performed. Judgment was rendered in favor of Westinghouse against Radkovich and Radkovich Sureties [R. 204]. Judgment was granted in favor of Radkovich and Radkovich Sureties against Woolley and Glens Falls in an amount equal to the judgment in favor of Westinghouse [R. 204]. Woolley recovered upon his cross-claim against both Radkovich [R. 211] and Radkovich Sureties [R. 205] for an unpaid balance on the subcontract, for certain extra labor and materials not included in the subcontract, for certain extra work caused by collapse of two buildings, for certain damages for delay, and for one-half the costs. The judgment in favor of Woolley expressly provided that Appellant Glens Falls should be entitled to apply as an offset against the judgment in favor of Radkovich and Radkovich Sureties all amounts for which Woolley was given judgment on his cross-claim [R. 205]. This left a balance due and payable by Woolley and Glens Falls. Only Glens Falls has appealed from this judgment.

II.

Jurisdiction of the District Court and the United States Court of Appeals.

1. Jurisdiction of the District Court.

Jurisdiction of the District Court was invoked by Westinghouse pursuant to the express provisions of federal statute, 40 U. S. C. A. 270b. In order to present to the court the necessary allegations upon which the District Court could entertain the action in accordance with 40 U. S. C. A. 270b(a), Westinghouse alleged the existence of the principal contract, the subcontract between Woolley and Radkovich, the existence of the bonds of Radkovich Sureties, the supply of materials to Woolley for use in the project, and an allegation that the contract was to be performed at Muroc, California, which is within the district of the trial court [R. 6]. In such an action the subcontractor is a proper party defendant (*United States to the Use and Benefit of Par-Lock Appliers of N. J. v. J. A. J. Const. Co., et al.* (D. C. E. D. Pa., 1943), 49 Fed. Supp. 85, affd., 137 F. 2d 584) and thus no further allegations were required for jurisdiction over the claim against Woolley

The Radkovich cross-claim against Woolley arose out of the transaction or occurrence upon which Westinghouse was relying in the principal action and thus was authorized by Rule 13(g), Federal Rules of Civil Procedure. That portion of the Radkovich cross-claim which sought relief against Glens Falls was squarely within the provisions of Rule 14(a), Federal Rules of Civil Procedure as it was asserted that if Radkovich was liable to Westinghouse, that by virtue of its bonds, Glens Falls would be liable over to Radkovich.

The Woolley cross-claim, like the Westinghouse principal action, depended upon the Miller Act for its jurisdictional requirements, but could just as well have been predicated upon Rule 13(g), Federal Rules of Civil Procedure for the reason that it was an action by one co-defendant against another co-defendant based upon the transaction or occurrence which was the subject of the principal action.

2. Jurisdiction of the United States Court of Appeals.

Jurisdiction on appeal is based upon 28 U. S. C. A. 1291.

III.
Statement of Facts.

Appellant's statement of facts is for the most part correct. Certain effort has been made by appellant to point up that portion of the evidence which was favorable to appellant in regard to whether or not certain items were extras, and as to the amount and method of payment. As to these matters, suffice it to say there is a conflict in the evidence, which conflict the trial court resolved as it did by its findings of fact. As to the telephone circuits, signalling system, and the fixtures, the trial court gave judgment for Woolley for these items as extra items not included in the subcontract. The facts surrounding the manner and method of determining the progress payments due Woolley were sufficiently conflicting that the trial court felt that appellant had not met its burden of showing that there were premature payments and found accordingly in Finding of Fact XVIII [R. 200]. In regard to the matter of a change in the method of the pay-

ments, the trial court found that there was no evidence that there had been a departure from the terms of the subcontract in this regard [R. 201].

IV.

Introduction to Argument.

Although the possibility of some duplication exists, appellee has endeavored to follow the basic outline presented by appellant to facilitate the court's consideration of the two briefs.

In its original cross-complaint appellee pleaded only the payment bond. At the suggestion of counsel for appellant, the performance bond was added to the pleadings. It should be borne in mind that the findings of the court in regard to the performance by Woolley of his portion of the subcontract, go only so far as to find that Woolley performed the subcontract *work*. From the stipulation of the appellant that Westinghouse had not been paid in full [R. 232], it is obvious that a finding that Woolley had performed in full would not be supported by the evidence. Appellee believes that the two bonds are separate instruments given for two separate purposes and that there is no basis for interpreting the two bonds as one instrument, or for reading into the payment bond the provisions of the performance bond.

ARGUMENT.

I.

The District Court Had Jurisdiction of the Radkovich Cross-claim.

A. The Radkovich Cross-claim Is Ancillary to the Principal Action.

No argument is made by appellant that the District Court did not have jurisdiction over the claim of Westinghouse Electric Supply Company against Radkovich and his Sureties. Jurisdiction for such actions is specifically conferred by the provisions of the Miller Act (40 U. S. C. A., Sec. 270b, subsec. (b)). Where such an action is commenced, the Federal District Court for any district in which the contract was to be performed and executed has jurisdiction over the action without regard to the amount of the controversy involved or without regard to the citizenship and residence of the parties to the action. It should be borne clearly in mind that this action by Westinghouse was by a material supplier of the subcontractor Woolley. As such Westinghouse had no direct contractual relationships with Radkovich. Nevertheless, by the provisions of subsection (a) of Section 270b of U. S. C. A. Title 40, a right of action is given to Westinghouse. And by the provisions of subsection (b) of Section 270b of U. S. C. A. Title 40 such an action must be brought in the Federal District Court. Where such an action is commenced, it has been held that the prime contractor is a proper party to the action. (*United States to the Use and Benefit of Foster-Wheeler Corp v. Amer. Surety Co. of N. Y.* (D. C. N. Y., 1938), 25 Fed. Supp. 700.) It has also been held that in such an action the subcontractor is a proper party defendant

where the action is against the general contractor and his sureties. (*United States to the Use and Benefit of Par-Lock Appliers of N. J. v. J. A. J. Const. Co. et al.* (D. C. E. D. Pa., 1943), 49 Fed. Supp. 85, affd., 137 F. 2d 584.)

Appellant next urges that the Westinghouse action has two phases, one phase being an action against Radkovich and his sureties wherein jurisdiction is conferred by the provisions of 40 U. S. C. A. 270b without regard to the amount in controversy or the diversity of citizenship of the parties, and a second phase being an action against Woolley which it is contended depends upon diversity of citizenship and amount in controversy. This is an attempt by appellant to divest the District Court of jurisdiction of the matter by tenuous distinctions. It is true that the Westinghouse action against Woolley is founded upon the contract obligation of Woolley to pay for materials purchased from Westinghouse. It is not true that as to this phase of the action depends upon diversity of citizenship and amount in controversy in order for the court to have jurisdiction over the matter. The jurisdiction over the Westinghouse v. Woolley portion of the action attaches without regard to the citizenship of the parties or the amount in controversy because the matter was ancillary to the action of Westinghouse against Radkovich and his sureties. It is likewise true that the Radkovich cross-claim is ancillary to the original action by Westinghouse. Being ancillary, no issue of diversity of citizenship or amount involved in the controversy is raised, nor is the pleading of such jurisdictional facts relative to amount in controversy or citizenship required. Appellant quotes Barron and Holtzoff in Volume 1 of Federal Practice and Procedure (Rules Ed.) (hereinafter referred to

.s Barron & Holtzoff) commencing at page 781 as fol-
ows:

> "A counterclaim or cross-claim arising out of the transaction or occurrence that is the subject matter of the original action or counterclaim therein, or relating to property that is the subject matter of the original action, may be adjudged even though independent grounds of federal jurisdiction do not exist."

This basic rule, as provided in Rule 13(g) of Federal
Rules of Civil Procedure is sufficient to demonstrate that
he cross-claim of Radkovich against Woolley is so re-
ated to the principal action as to require no independent
grounds of jurisdiction.

Had appellant read further in the above-quoted text,
he would have discovered the following language in Barron
and Holtzoff (Vol. 1, Sec. 427, p. 865):

> "The third-party complaint need not state any grounds of jurisdiction if the court already has jurisdiction of the principal action and the third-party claim needs no new grounds of jurisdiction to support it. Otherwise such grounds must be stated."

Citing as authority therefor *Dworkin v. Spector Motor
Service* (D. C. Conn., 1944), 3 F. R. D. 340. See also
Rule 8(a) Federal Rules of Civil Procedure expressly
xcepting from the requirement of pleading basis of juris-
iction in counterclaims, cross-claims, and third-party
laims, when the court already has jurisdiction and the
laim needs no new grounds of jurisdiction to support it.

Whether or not the claim needs new grounds of juris-
iction to support it depends on whether or not the matter
n issue in the third-party claim or the cross-claim is
ufficiently related to the principal action as to be con-

sidered to be ancillary thereto. It is the well established rule that the District Courts have jurisdiction to complete the adjudication of a matter in its entirety once the jurisdiction of the court has been competently invoked. (*Lesnik v. Public Industrials Corporation* (C. C. A. 2nd, 1944), 144 F. 2d 968; *Arizona Lead Mines v. Sullivan Mining Co.* (D. C. Idaho, 1943), 3 F. R. D. 135.) It has also been held that the expression "transaction or occurrence" may comprehend a series of many occurrences. (*Lesnik v. Public Industrials Corporation, supra.*) The principal action by Westinghouse arose not out of the execution of the bond by Radkovich's Sureties alone. It arose out of the entire series of transactions including the prime contract, the Miller Act bond, the subcontract, the subcontract bonds, and the sale of goods to Woolley. All these occurrences were necessary for Westinghouse to spell out its right, so it is submitted, the cross-claim of Radkovich comprehended the same transactions and occurrences of the principal action, and that no new bases of jurisdiction were required.

B. The Radkovich Cross-claim Is Authorized by Rule 13.

Appellant seeks to limit the "transaction of occurrence" which was the subject matter of the principal action to the bond of Radkovich given under the Miller Act. Clearly this effort of appellant's is without foundation in fact or in law. It is true that by the provisions of the Miller Act a material supplier who has sold materials which were furnished for use on a government contract in which a Miller Act bond is required may bring an action directly on the bond and against the general contractor in the Federal district court without regard to the amount in controversy or the citizenship of

the defendants. However, in order to qualify as one of the class to whom this right of action is given, the material supplier must allege facts which show some transaction or occurrence between the material supplier and the sub-contractor on the job covered by the Miller Act bond, which reveals that the supplier did actually supply materials for the job in question. In other words, the execution of the Miller Act bond does not *ipso facto* give to persons who have sold or who do thereafter sell materials to a subcontractor of the bonded general contractor a right to bring an action on the bond. To spell out such a right to recover on the Miller Act bond and against the general contractor, the material supplier must allege facts which reveal a transaction or occurrence between himself and the subcontractor such as will give the supplier the right to bring the action. Thus it may be seen that the transaction or occurrence which is the subject matter of the action by such a material supplier is not just the bond provided by the general contractor pursuant to the Miller Act, but the transaction or occurrence which is the subject matter of the action encompasses his contract of sale to the subcontractor and the subcontractor's subcontract with the general contractor, as well as the general contract itself. As has been observed above, the expression transaction or occurrence may comprehend a series of many occurrences such is the situation in the present case. In order to avail itself of the right to bring the action in the first place, Westinghouse had to rely upon a series of transactions commencing with the execution of the general contract, the Miller Act bond, the subcontract, and its own contract of sale to Woolley. *Absent any one of these transactions or occurrences, and Westinghouse would not have*

been able to state a cause of action on the Miller Act bond in this matter. The fact is that the transaction or occurrence which is the subject of the original action by Westinghouse comprehended all these occurrences. The cross-claim of Radkovich and his sureties names as cross-defendants Woolley and Glens Falls Indemnity Company. As to Woolley there can be no doubt but that the cross-claim is authorized by Rule 13(g) Federal Rules of Civil Procedure. Woolley was a proper party in the original Westinghouse action as was Radkovich and his sureties. United States to the Use of *Par Lock Appliers of N. J. v. J. A. J. (supra)* Rule 20(a) Federal Rules of Civil Procedure, provides in regard to the joinder of parties defendant:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

In the Westinghouse action the question of fact was what materials and of what value was supplied to Woolley, whether or not it went into the job, and whether or not Westinghouse had been paid for materials so supplied. These same questions of fact were at issue in the claim of Radkovich against Woolley. Thus, clearly Radkovich and his sureties could assert a cross-claim against Woolley a co-defendant, by the provisions of Rule 13(g). Appellant urges that the Radkovich cross-claim is misnamed, as to cross-defendant Glens Falls, for the reason that it should be denominated as a

third party claim. Regardless of this and in accordance with the liberal rules of pleading adopted by the Federal Rules of Civil Procedure, the claim against Glen Falls must stand or fall on its substance and not on the particular title which Cross-complainant has given to his pleading. Rule 8(f) Federal Rules of Civil Procedure.

Appellant argues that whatever the claim against Glens Falls may be that it is an improper attempt to implead a third party. Turning now to the *Radkovich v. Glens Falls* phase of the cross-claim appellant argues that the issues are wholly outside the issues of the original action and that there is no basis for ancillary jurisdiction. Appellee contends, however, that the issues of the Radkovich claim versus Glens Falls are directly within the issues of the original Westinghouse claim and as such the claim is authorized by Rule 14a of the Federal Rules of Civil Procedure. Further, appellee contends that this matter is ancillary to the principal action and is within the jurisdiction of the court to determine in one action all matters relevant to the controversy before it and over which it has jurisdiction.

(1) As to the Issues Involved.

Analyzing the claim of Westinghouse we find that it is the claim of a material supplier against the subcontractor to whom it supplied the material and with whom it had direct contractual relationships, and against the general contractor and his sureties with whom it did not have any direct contractual relationship. The claim of Radkovich against Woolley arose out of the very subcontract between Woolley and Radkovich which gave

Westinghouse a right to bring the action in the first place. The subcontract between Radkovich and Woolley provided that Woolley would provide two bonds, a performance bond and a payment bond for the benefit of Radkovich. Pursuant to this requirement of the subcontract, Glens Falls executed both the performance bond and the separate payment bond [see Ex. C.]. The subcontract between Woolley and Radkovich recites that as a condition precedent to the granting of the subcontract that the subcontractor agreed to provide the bonds which were in fact executed by Glens Falls [R. 45]. Had the bonds not been executed the subcontract would not have come into existence. Since Westinghouse based its claim against Radkovich and his sureties on the fact that it has supplied a subcontractor of Radkovich with materials for which it has not been paid, it must necessarily follow that the issues involved included the questions as to whether or not Westinghouse had been paid by Woolley and what the value of the materials supplied was. By the terms of the payment bond Glens Falls agreed to pay Radkovich if Woolley should not hold Radkovich free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in the subcontract. The issues of the Westinghouse claim versus Radkovich and his sureties were primarily whether or not Woolley had paid it, a material supplier, for materials supplied in the prosecution of the work. The issues in the claim of *Radkovich v. Glens Falls* were whether or not Woolley had paid Westinghouse, a material supplier, for the materials supplied in the prosecution of the work.

(2) The Radkovich Claim Versus Glens Falls Is Ancillary to the Westinghouse Action.

From the above discussion it may be seen that the cross-claim of *Radkovich v. Woolley* and the third party claim versus *Glens Falls* involved the very issues which were before the court in the action by *Westinghouse v. Radkovich* and its sureties. It may also be seen that the transactions and occurrences upon which Westinghouse depended for jurisdiction and upon which Radkovich depended were all interdependent. It has been held that for ancillary jurisdiction it is not necessary that all the rights arise out of the same contract. An ancillary suit may be maintained though the rights arise under different contracts and without regard to the citizenship of the third party defendant. (*Saba v. Emil Katz & Co.* (D. C. S. D. N. Y., 1944), 55 Fed. Supp. 1000); (*Morrell v. United Air Lines Transp. Comp.* (D. C. S. D. N. Y., 1939), 29 Fed. Supp. 757); (*Hoskie v. Prudential Ins. Co., etc.* (D. C. S. D. N. Y., 1941), 39 Fed. Supp. 305); (*Bossard v. McGwinn* (D. C. W. D. Pa., 1939), 27 Fed. Supp. 412). Appellant argues that the matter must be ancillary before a third party may be brought in. The true rule is that if the requirements of Rule 14a are met and a third party may be brought in then the matter is ancillary. (*Herrington v. Jones* (E. D. La., 1941), 2 F. R. D. 108). A third party may be brought into a case where it is alleged that the third party is liable to the defendant in the original action on an indemnity or insurance agreement. (*Sussan v. Strasser* (E. D. Pa., 1941), 36 Fed. Supp. 266.) Before 1948 Rule 14a allowed the bringing in of a third party defendant who it was alleged was liable only

to the plaintiff as well as those who it was alleged were liable to the defendant. This rule was unworkable, as the original plaintiff could not be required to amend his complaint to assert his rights against the third party so brought in who it was alleged was liable to the plaintiff only. By the amendment of 1948 to Rule 14a a third party defendant can only be brought in when it is alleged that he is or may be liable to the fendant for all or part of the plaintiff's claim against the defendant. Such third party claims are to be considered ancillary to the main suit. (*Reed v. Hickey* (E. D. Pa., 1941) 2 F. R. D. 92).

C. General Provisions Regarding Ancillary Jurisdiction.

Appellant contends that Rule 82 in effect limits Rule 14a in the same manner as the wording in Rule 13(h) namely, that the bringing in of a third party will not be allowed if to do so would deprive the court of its jurisdiction. Even appellant recognizes that where the Federal district court has jurisdiction over the principal action that as a necessary element of its power to decide cases it would have ancillary jurisdiction over related matters. In the discussion of third party practice in Barron & Holtzoff, Vol. 1, sec. 424, p. 841, it is stated thusly:

> "Clearly a third-party claim by a defendant that a third person is liable to him for all or part of the claim in suit is so closely involved with the subject matter of the action as to be regarded as ancillary thereto. Thus if the court has jurisdiction of the principal action, it needs no independent grounds of jurisdiction to entertain and determine the defendant's third-party claim."

That this expression of the leading text writers on the subject is borne out by the decisions is evident from the case of *Miller v. Hano* (D. C. E. D. Pa., 1947), 8 F. R. D. 67. See also *O'Brien v. Richtarsic* (D. C. W. D. N. Y., 1941), 2 F. R. D. 42, 44; *Reed v. Hickey,* 2 F. R. D. 92; *Herrington v. Jones,* 2 F. R. D. 108, and *Sussan v. Strasser* (E. D. Pa., 1941), 36 Fed. Supp. 266.

See also *Millsap v. Lotz* (D. C. Mo., 1951), 11 F. R. D. 161 where the court indicated that the ancillary jurisdiction of the court extended to matters incidental to the principal suit whether by counterclaim or by cross-claim or third party claim.

Again these leading text writers Barron & Holtzoff, Vol. 1, sec. 424, p. 846, state:

> "Federal ancillary jurisdiction is not defeated by the fact that the liability of a third party is joined with an alternative claim that the third party is the sole party liable to the plaintiff (Arsht v. Hatton D. C. Pa., 1947, 72 Fed. Supp. 851), nor by the fact that the liability of the third party defendant is asserted upon a basis differing from that upon which the plaintiff's original claim for relief is asserted (*Kelly v. Pa. Ry. Co.,* D. C. Pa., 1948, 7 F. R. D. 524), as in the case of an indemnity agreement (*Pearce v. Pa. Ry. Co.,* D. C. Pa., 1946, 7 F. R. D. 420, affirmed 162 F. 2d 524) or violation of duty imposed by contract and state law." (*Kelly v. Pa. R. Co. supra.*)

A third party action is ancillary to the original action and requirements as to venue and jurisdiction over subject matter need not be complied with in the third party

action, but this rule does not extend to service of process and jurisdiction over person.

Miller v. Hano (D. C. E. D. Pa., 1947), 8 F. R. D. 67;

Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Bornemeier (D. C. Neb., 1952), 13 F. R. D. 146.

Appellant suggests that only a true cross-claim (such as the Radkovich claim versus Woolley) or a compulsory counterclaim should be considered to be ancillary to the principal action, citing Barron & Holtzoff for the rule. Appellant also cites that source for a statement that a permissive counterclaim is not to be considered to be ancillary to the principal action but must be supported by independent grounds of jurisdiction. Had appellant cited further in the same source he would have discovered the language above cited from section 424 relative to third party claims. Thus it may be stated that the *true rule is that compulsory counterclaims, cross-claims,* and *third party claims* are all to be considered to be ancillary to the principal action and not dependent upon independent grounds for jurisdiction. See *Millsap v. Lotz, supra.* Permissive counterclaims may require independent bases of jurisdiction, but such permissive counterclaims are not in issue in this action. With these distinctions clearly in mind let us now turn to appellant's discussion of the specific limitations of ancillary jurisdiction in cases brought under the Miller Act.

D. Ancillary Jurisdiction in Cases Under Miller Act.

The question of whether a matter may be considered ancillary to the principal action is not dependent upon whether the principal action is placed in a federal court because of diversity of citizenship and amount in controversy, or whether the matter is in the federal district court pursuant to express statutory provisions requiring the action to be brought in a federal court. It has been held that a third party claim may be allowed without regard to amount in controversy and citizenship of the third party defendant, even though the principal action was placed in the federal court by statute of the United States. In *National City Bank of New York v. Valldejuli Puig* (U. S. D. C Puerto Rico, 1952), 106 Fed. Supp. 1, the action was in the federal court by virtue of the statutory provisions of the Banking Act of 1933. A third party claim was allowed against a co-obligor on a letter of guaranty. It was argued that the third party defendant and the defendant in the principal action being citizens of the same district divested the court of jurisdiction. This argument was rejected by the court which indicated that where jurisdiction of the court attached pursuant to United States statute that the lack of diversity between the defendant and the third party defendant was not material, relying upon *Williams v. Keyes* (C. A. 5, 1942), 125 F. 2d 208.

Appellant's contention that because jurisdiction in a Miller Act case is conferred by statute, that the provi-

sions relative to third party claims do not apply is not supported by the decisions. In *United States v. Skilken* (D. C. N. D. Ohio, 1943), 53 Fed. Supp. 14, cited by appellant very briefly on page 47 of appellant's brief, the court considered very carefully the theory of the asserted claims and allowed both a counterclaim and a third party claim as ancillary to the main action. The facts are strikingly similar. In that case the principal action was by the United States to the Use and Benefit of *Jones v. Skilken* and his sureties. Jones was a subcontractor. Skilken was a general contractor who had executed a contract with the Federal government and had put up the required Miller Act bond. In addition Skilken had required Jones to put up a bond guaranteeing that Jones would perform the subcontract and would pay all labor and material bills incurred by Jones on the job. This is analogous to our case where Woolley, a subcontractor to Radkovich the general contractor, who had provided Miller Act bonds, was required by the general contractor to put up a payment bond and a performance bond for the protection of the general contractor.

In the *Skilken* case, the general contractor brought a counterclaim against the subcontractor, Jones, and a third party claim against the subcontractor's surety. Note the similarities to the case at bar. Radkovich brought a cross-claim against Woolley and a third party claim against Glens Falls. Appellant admits that cross-claims are to be considered to be ancillary, and by the *Skilken* case the court takes the position that claims against the third party surety are also ancillary. It should be noted that in the *Skilken* case, there was no contention that

the subcontractor's surety would be liable to the general contractor for like amounts as the court might find the general contractor liable to the subcontractor. For this reason, the court indicated that the surety was brought in under the provisions of Rule 13(h) in order to complete the determination of the controversy before it. On page 20 of that opinion the court stated:

> "Following the procedure in the above case, it would seem proper for the defendant Skilken Brothers to bring in the United States Fidelity & Guaranty Company, surety for the subcontractor, as a third party defendant, in an effort to recover from it any loss which it may prove to have sustained by reason of the failure of the plaintiff to perform the obligations under the contract to insure the performance of which the bond of the United States Fidelity and Guaranty Company was given."

See also *Schram v. Roney* (1939), 30 Fed. Supp. 458 where after an excellent discussion the court allowed a third party claim.

The case of *United States v. John A. Johnson* (D. C. D. Md., 1945), 65 Fed. Supp. 514 cited by appellant as the greatest extension of the courts in cases under the Miller act involved an action by a material man against the general contractor and his sureties. The subcontractor was brought in by the general contractor, and sought to litigate in the matter the question of *damages for breach of contract* against the general contractor. This case is not analogous to the one at bar factually, but in any event only stands for the proposition that the court will not entertain *damage* suits in a Miller Act proceeding.

Appellant's argument that to permit the joinder of a claim which has no independent basis of jurisdiction would be to allow Rules 13 and 14 to extend the jurisdiction of the District Courts in violation of Rule 82. This is begging the question, for the true rule is that the jurisdiction of the Federal District Court encompasses ancillary matters and independent bases of jurisdiction are not required. Appellant would treat the rule as being, that if independent basis of jurisdiction are not present, then the matter is not ancillary. This is getting the cart before the horse. *The first consideration of the court is whether or not the matter is truly ancillary. If it is then no further consideration of the bases of jurisdiction need be made.* In other words, a determination that a matter is ancillary establishes the court's jurisdiction over that matter, not the other way around. And the question of whether or not a matter is ancillary turns on whether it arises out of the same transaction or occurrence or series of transactions or occurrences as are the subject of the principal action over which the jurisdiction of the court has been properly invoked. (*Chernow v. Cohn & Rosenberger, Inc.* (1934), 5 Fed. Supp. 869).

Relying upon dicta from various cases, the appellant seeks to confuse the issue before the court in the present case. In *United States v. Biggs* (D. C. E. D. Ill., 1942), 46 Fed. Supp. 8, the action was by the United States to the use of a subcontractor against the general contractor and his surety. The case stands for the proposition that the defendant general contractor could not seek affirmative relief against the United States under the procedure of Rule 13(g) especially in view

of the prohibition contained in Rule 13(d). *Seaboard Surety v. United States* (C. C. A. 9, 1936), 84 F. 2d 348, indicates that a claimant under a Miller Act bond may proceed without joining the principal contractor. This case should be considered along with United States to the use of *Foster-Wheeler Corp. v. Amer. Surety Co. of N. Y.* (D. C. N. Y., 1938), 25 Fed. Supp. 700 that the principal contractor is a proper party in a Miller Act proceeding.

United States v. Landis & Young (D. C. W. D. La., 1936), 16 Fed. Supp. 835 and *United States v. Maples* (D. C. W. D. La., 1934), 6 Fed. Supp. 354 are both District Court cases and are earlier than the decision in *United States v. Skilken* (D. C. N. D. Ohio, 1943), 53 Fed. Supp. 14, wherein the general contractor was allowed to bring in the subcontractor's surety for a complete determination of the matter. In line with the liberal spirit of the Federal Rules of Civil Procedure, and to give some meaning to Rule 14(a) it is submitted, that where as in the present case, a defendant in the principal action seeks relief on a contract with a third party for any liability which he, the original defendant may suffer in the principal action, the third party claim should be allowed and litigated as ancillary to the principal action.

It is true that the claim against the third party defendant must be that of the original defendant, but based upon the original plaintiff's claim against the original defendant. It is not true as appellant suggests that the claim of Radkovich against Glens Falls is entirely separate and apart from the subject matter of the original action. The Radkovich claim against Glens Falls is not

independent in subject matter to the original action by Westinghouse. The subject matter of the Westinghouse action encompassed the entire transaction, including the general contract, the Miller Act bond, the subcontract, and the subcontract bond, which was required as a condition precedent to the execution of the subcontract [R. 45]. The test of whether or not the subject matter of the action arose out of the same transaction or occurrence is whether or not the same evidence would support or refute both claims. (*Brown v. 1st National Bank v. Grimmett* (D. C. E. D. Okla., 1953), 18 F. R. S. 14(a) .52, Case 1.) Applying that test in this case it is obvious that the questions of fact relative to what Westinghouse supplied, and whether or not Woolley paid Westinghouse for the materials so supplied are the same questions of fact litigated in the Radkovich claim against Glens Falls and depended upon the same evidence in support thereof.

E. The Radkovich Cross-claim Is Directly Authorized by the Rules.

Treating only the Radkovich claim against Glens Falls as in issue in this appeal, it is clear that such action is directly contemplated by Rule 14(a) of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure provide in part in Rule 14(a):

> "Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff for leave as a third party plaintiff to serve summons and complaint upon a person not a party to the action *who is or may be liable* to him for all or part of the plaintiff's claim against him . . ." (Emphasis added.)

The import of this rule is that if a determination that the defendant is liable to the plaintiff gives rise to a right on the part of the defendant to bring an action against a third party, then that third party may be brought in and that aspect of the matter disposed of at the same time that the liability of the defendant is fixed. Further, it is to be noted that by Rule 14(a), the third party defendant may be brought in if he either *"is or may be liable"* to the original defendant. Thus the rule expressly indicates that third parties may be brought in when their liability is not yet fixed or determined but is in reality inchoate. This rule has been said to have the effect of "accelerating" the cause of action and providing that the third party whose liability is still not yet matured may nevertheless be brought into the action.

In *Glens Falls Indemnity Co. v. Atlantic Building Corp.* (C. A. 4, 1952), 199 F. 2d 60, the principal action was by an insured against the insurance company. The company sought to bring in as a third party defendant one whom it was averred would be liable to the insurance company upon the principles of subrogation. It should be noted that by the substantive law of South Carolina, which was applicable in the case, no cause of action based upon subrogation could be asserted until the subrogee had actually paid out money. Nevertheless, the court held that by the provisions of Rule 14(a) the subrogor could be brought in as a third party defendant. A good statement of the attitude of the Fourth Circuit Court on the applicability of Rule 14(a) is to be found on page 63 of that decision where it is stated:

> "It is true in South Carolina and elsewhere that the right of subrogation may not be recognized unless the party asserting it has paid the debt on which the

right of subrogation is based. American Surety Co. v. Hamrick Mills, 191 S. C. 362, 4 S. C. 2d 308, 124 A. L. R. 1147. But this rule applies when the indemnitor brings a separate suit against the person whose action has caused the loss. Rule 14 was designed to prevent this circuity of action and to enable the rights of an indemnitee against an indemnitor and the rights of the latter against a wrongdoer to be finally settled in one and the same suit. It is generally held that it is no obstacle to a third party action that the liability, if any, of the third party defendant can be established only after that of the original defendant and after satisfaction of the plaintiff's claim, where subrogation is the basis of the claim. See Lee's Inc. v. Transcontinental Underwriters, Md., 9 F. R. D. 470, and cases cited."

In *McLouth Steel Corp. v. Mesta Machine Co. v. Hartford Accident & Indemnity Co.* (U. S. D. C., E. D. Pa.), 17 F. R. S. 14a.221, Case 1, the same result was reached where the third party defendant insurance company sought to assert a provision in an insurance policy that no action would lie thereon until a loss had been sustained, the court holding that by Rule 14(a) the insurance company could properly be brought in. See also *Jordan v. Stephens* (1945), 7 F. R. D. 140, in accord.

Bill Curphy Co. v. Lincoln Bonding & Insurance Co. v. Bornemeier (D. C. Nebr., 1952), 13 F. R. D. 146, is a case very much in point. The question came up on motion of a third party defendant to dismiss because it was contended that he was of the same citizenship as the original defendant. The court's remarks are pertinent to the case at bar. On page 147 it stated:

"In its present form, Rule 14(a) allows the bringing in by a defendant of one not originally a party

to an action as a third party defendant 'who is or may be liable to' the defendant 'for all or part of the plaintiff's claim against' the defendant. No other jurisdictional prerequisite to the employment of the procedure is expressly imposed by the rule.

"Here the defendant, sued by the plaintiff on a subcontractor's performance bond and a subcontractor's payment bond in each of which the plaintiff is the obligee, Dungan the contractor-obligor, and the defendant the surety-obligor, seeks to hold as liable to it for any recovery against it by the plaintiff, (a) Dungan both as primary obligor in the bonds and as the maker of special engagements for the defendant's indemnification contained in the application for the bonds, and (b) Bornemeier by virtue of an express written joinder in the engagements of Dungan endorsed on that application. It is difficult for the court to conceive a more fitting background than the plaintiff's action and demand against the original defendant, for resort to Rule 14(a), since the asserted obligations of Bornemeier and Dungan arose out of their procurement of the bonds on which the plaintiff predicates its claim against the defendant."

As to the question of the propriety of the third party complaint the court continued:

"Bornemeier challenges the jurisdiction of this court over him under the third party complaint on jurisdictional grounds, and particularly for want of diversity of citizenship as between the original defendant and the moving third party defendant.

"It is true that the original defendant and both of the third party defendants are citizens of Nebraska. But the jurisdiction of this court having been validly invoked and clearly existing as between

the plaintiff and the original defendant, it is now the settled position of the great majority of Federal courts that, in support of the otherwise permissible bringing in of third party defendants to answer a claim, which is clearly ancillary to the primary claim in suit, no new and independent ground of jurisdiction need exist as between the original defendant and the third party defendants, and specifically that community of state citizenship between them will not require a denial or dismissal of third party procedure. Tullgren v. Jasper (D. C., Md.), 27 F. Supp. 413; Yap v. Ferguson (D. C. N. Y.), 8 F. R. D. 166; United States v. Pryor (D. C. Ill.), 2 F. R. D. 382; Falcone v. City of New York (D. C. N. Y.), 2 F. R. D. 87; Schram v. Roney (D. C. Mich.), 30 F. Supp. 458; Morrell v. United Air Lines Transport Corp. (D. C. N. Y.), 29 F. Supp. 757; United States v. Hecht (D. C. Ohio), 9 F. R. D. 340; Goodard v. Shasta S. S. Co. (D. C. N. Y.), 9 F. R D. 12; Millsap v. Lotz (D. C. Mo.), 11 F. R. D. 161. See also discussion in Sheppard v. Atlantic Gas Co. (3 Cir.), 167 F. (2d) 841. That some divergence of opinion upon the subject exists must be acknowledged; but the preponderance of authority favors the rule just stated. See textual analysis and discussion, Moore's Federal Practice, Second Edition, Vol. 3, p. 496, par. 14.26."

That this acceleration has been applied even where by state law the liability of the third party is not yet mature see *Glens Falls Indemnity Co. v. Atlantic Building Corp. (supra)* and *Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Bornemeier (supra)*. This concept applies even since *Erie R. R. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, the theory being that such provision is procedural and not a part of the substantive law. (See

also *State of Ill. v. Md. Cas. Co.* (D. C. N. D. Ill, 1941), 2 F. R. D. 241.)

It is submitted, that as against Glens Falls, appellee Radkovich has stated a claim within the rules; that the very purpose and spirit of Rule 14(a) is to allow a defendant such as Radkovich to bring in a third party defendant such as Glens Falls. To interpret the Rule 14 in any other manner would be to unduly restrict the meaning of the language and to hamper the speedy and complete determination of the issues before the District Court. (See *Miller v. Hano* (D. C. E. D. Pa., 1947), 8 F. R. D. 67; *Lawrence v. Great Northern Ry. Co.* (D. C. Minn., 1951), 98 Fed. Supp. 746.)

In short, the very purpose of Rule 14 is to allow such claim as Radkovich here asserts against Glens Falls. Federal Practice & Procedure by Barron & Holtzoff, Vol. 1, Sec. 426, p. 850 states in regard to Rule 14:

> "Subdivision (a) of this rule, both as originally drafted and as later amended, permits a defendant to bring into an action a third-party defendant 'who is or may be liable to him' for all or part of the plaintiff's claim. Thus impleader is authorized to bring in a third party who would necesasrily be liable to the defendant for all or any part of plaintiff's recovery, whether by way of indemnity, subrogation, contribution, express or implied warranty, or otherwise."

See:

Yap v. Ferguson (D. C. N. Y., 1948), 8 F. R. D. 166;

Rappa v. Pittson Stevedoring Corporation (D. C. E. D. N. Y., 1943), 48 Fed. Supp. 911;

People of State of Ill. v. Md. Cas. Co. (D. C. N. D. Ill., 1941), 2 F. R. D. 241;

Falcone v. City of N. Y. (D. C. N. Y., 1941), 2 F. R. D. 87;

Watkins v. Baltimore & O. R. Co. (D. C. Pa., 1939), 29 Fed. Supp. 700;

Young v. Atl. Refining Co. (D. C. N. D. Ohio, 1949), 9 F. R. D. 491.

See also *Jordan v. Stephens* (D. C. W. D. Mo., 1945), 7 F. R. D. 140, where a general contractor was sued by the subcontractor's compensation insurance carrier and by an employee of the subcontractor, the general contractor was entitled to bring in as a third party defendant its own insurer, notwithstanding a policy provision that no action should lie against the insurer unless brought after amount of claim or loss had been fixed and rendered certain by final judgment or agreement.

II.

Radkovich Cross-claim States Grounds Upon Which Relief Can be Granted.

A. Allegations of Liability of Glens Falls.

The liability of Woolley and of Glens Falls is clearly spelled out in the pleading of Radkovich and his Sureties. Paragraph XI of the Radkovich pleading denominated cross-claim clearly sets forth that Westinghouse has made claim against Radkovich and his sureties, setting forth the amount of the claim and the facts out of which Westinghouse claims to be entitled to relief [R. 25]. The legal effect of the payment bond is alleged in Paragraph X, wherein it is alleged that Glens Falls bound itself to Radkovich as surety for Woolley as principal for the payment of labor and materials used in the prosecution of the work provided for in the subcontract [R. 23]. Further, any de-

fects in the pleading of the legal effect of the bond provided by Glens Falls are cured by the pleading by Glens Falls in answer to this third party claim of Radkovich and his Sureties, in that the bonds in question were pleaded as exhibits and their execution admitted. Such pleading presented to the court not only the legal effect of the bonds as pleaded by Radkovich, but also the entire bond as an exhibit which the court then had opportunity to interpret. Appellant suggests that by Rule 8(a) that a causal connection is required to be pleaded. Rule 8 (a)(2) provides *"a short and plain statement of the claim showing that the pleader is entitled to relief, and . . ."* From the Radkovich pleading it is clear that Radkovich was relying upon the provisions and promises contained in the bonds executed by Glens Falls for the relief sought. The relief sought is clearly spelled out in paragraph XI of the Radkovich cross-claim [R. 25] wherein it is alleged that Woolley has failed to pay Westinghouse, which caused Westinghouse to bring the action in the first place. Finally the prayer of the Radkovich pleading reveals the nature of the relief sought in that it is clear that Radkovich only wants to be paid whatever the court may find was due and owing and unpaid from Woolley to Westinghouse and in such amount as the court should find Radkovich liable. This is specifically within the realm of the purpose of a third party claim. Such claims are to be used where the defendant in the principal action claims that if he is liable to the plaintiff in the original action that the third party defendant is in turn or may be liable to the original defendant for like amount. Barron & Holtzoff, Volume 1, Section 255, page 431, states in regard to Rule 8(a)(2):

> "This provision indicates clearly the intention of the rules to avoid technicalities and to require only

that the pleading give the opposing party fair notice of the nature and basis of the claim and a general indication of the type of litigation involved."

Further, Rule 8(f) states *"All pleadings shall be so construed as to do substantial justice."* It is submitted that the cross-defendant and appellant were in no manner misled by the pleading of Radkovich be it called cross-claim or third party claim. Further by its own answer wherein the Woolley subcontract and the Glens Falls bonds were set forth as exhibits, any defects in the pleading of Radkovich is cured.

Under these rules the complaint need not set forth every fact essential to plaintiff's right of recovery. (*Hess v. Factors Corp. of America* (D. C. E. D. Pa., 1948), 80 Fed. Supp. 727; *Lane Bryant, Inc. v. Maternity Lane, Limited, of Cal.* (C. A. 9th, 1949), 173 F. 2d 559.) A generalized summary of case that affords fair notice is all that is required of pleadings, which shall be so construed so as to do substantial justice. (*Bank of Nova Scotia v. San Miguel* (D. C. Puerto Rico, 1949), 9 F. R. D. 171.)

Barron & Holtzoff, Volume 1, Section 255, page 434 states:

> "Conspicuously absent from this rule is the requirement of common law and code pleading that the pleader set forth 'facts' constituting a 'cause of action,' which resulted in abortive attempts to define 'cause of action' rigidly and to make clear distinctions between the 'ultimate fact' which must be pleaded and 'evidence' and 'conclusions of law' which must not be pleaded."

In the present case, the pleading clearly shows the basis of the claim against Glens Falls, namely, the bonds exe-

cuted by it naming Radkovich the obligee. The claim further advised the third party defendant that the relief sought by Radkovich and his sureties to be that which the court shall find is due and owing to Westinghouse by virtue of Woolley's failure to pay Westinghouse. Such a claim does not deceive anyone. It is abundantly evident from the record and from all the pleadings or file in this matter that appellant Glens Falls was not in any manner deceived or confused as to the nature of the claim against it. No more than this is required of a pleading under the rules.

Rule 8(a) requires a short and plain statement of the claim showing that the pleader is entitled to relief. Rule 14(a) allows the bringing in of a third party defendant when the original defendant avers that such third party *"is or may be liable to him for all or part of the plaintiff's claim against him"* . . . Taking these two rules together, there can be no doubt but that the allegations of Radkovich and his sureties relative to the claim which Westinghouse asserted against Radkovich, together with the allegations of the bonds which Glens Falls executed expressly for the purpose of holding Radkovich harmless in the event Woolley should fail to pay for the labor and material which went into the job covered by the subcontract, state a claim upon which relief can be granted. The claim apprises the third party defendant of relief sought by Radkovich and of the facts out of which this relief is sought. Beyond this the pleader is not required to go under the rules. Further, under Rule 14(a) it is not necessary that the third party plaintiff allege that he has already suffered damage, but only that the third party defendant *may* be liable to the defendant, for the claim which the plaintiff asserts against the defendant.

To require more of a pleader on a third party complaint than the allegation of the facts which give the third party defendant notice of the fact that he may be held liable in the event the plaintiff prevails against the defendant would be to unduly restrict the provisions of Rule 14(a) and in fact make that portion which refers to the fact that a third party defendant may be brought in if it is alleged he *may* be liable to the original defendant a nullity.

The *Quilty* case relied upon by appellants (Appellants' Br. p. 58) was a situation where upon motion of the third party defendant, the court held that *unless amended* the third party complaint did not state a claim against the third party defendant. It is submitted, that in the absence of a motion by appellant attacking the third party complaint, and in view of the issues as they were litigated, that by the provisions of Rule 15(b) any defects in appellee's third party complaint were effectively cured. Rule 15(b) provides in part:

> "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

In the present case, the question of whether or not a claim was stated was in issue by virtue of appellant's Sixth Affirmative Defense and was effectively disposed of by Finding of Fact XVIII [R. 201]. Further, there was no doubt but that this question was litigated between the parties so by the provisions of Rule 15(b) the plead-

ng could even at this late date be amended, or in the bsence of such an amendment the result of the trial still tands.

B. Radkovich Could be Allowed to Recover Under the Performance Bond.

1. Performance of the Subcontract.

In the case at issue, it is clear that even if the pleadngs were insufficient, as they originally were pleaded, hat the issues which were tried, with the consent of the arties, involved the performance of both Radkovich and Voolley of the subcontract, and of the conditions preceent of both the performance bonds. On the question f the performance of the subcontract by Woolley, there s ample evidence that Woolley did not pay for all the naterials which he ordered from Westinghouse [R. 232]. By the provisions of the subcontract Woolley agreed to urnish all the materials and labor necessary for the perormance of the subcontract. His failure to pay Westnghouse was a direct failure to perform all of his promses of the subcontract. The issue of the payment by Voolley to Westinghouse was directly tried, and the findng of fact [Finding XI, R. 196] expressly show that Voolley failed in the performance of the subcontract in hat he did not pay Westinghouse in full. It should be oted in this regard, that the objections to the proposed ndings of fact [R. 166] included a statement that Voolley performed all of the subcontract. In the final orm at the insistence of counsel for Radkovich and his ureties this finding now reads that Woolley performed he subcontract *work* [R. 185] for the very reason that he performance of the subcontract by Wooley involved ot only the doing of the work but also the payment for

materials, and the evidence clearly showed that Woolley did not pay Westinghouse in full for the materials furnished and used in the subcontract. [See objections to proposed findings of fact, R. 167; Letter of E. V. McPharlin, R. 185; and final findings XIII, R. 197.] Further, the cross-claim against Woolley and Glens Falls clearly states that Woolley has not paid Westinghouse in full for the materials [R. 25], so there is a sufficient statement of the breach by Woolley. Woolley and Glens Falls were not deceived. The entire subcontract was pleaded as a part of the answer of Glens Falls, and taken together with the allegation of the Radkovich cross-claim that Woolley had not paid Westinghouse, the failure of Woolley to perform is sufficiently spelled out. Further, the performance bond was to be void only if Woolley performed his subcontract in its entirety. The performance of Glens Falls under the performance bond is dependent only upon and conditioned only upon the performance by Woolley. If Woolley performs it is void—if Woolley does not perform, the bond is still valid. By the finding of the court that Woolley did not pay Westinghouse in full, there is a finding that Woolley has failed to perform his portion of the subcontract. Such a finding gives rise to an action against appellant Glens Falls.

Blackwood v. McCallum (1922), 187 Cal. 655.

2. Performance of Conditions Precedent in Performance Bond.

Appellant refers to certain conditions precedent in the performance bond and argues (App. Br. p. 61) that the failure to perform such conditions precedent was alleged as an affirmative defense. Appellee's careful reading of the appellant's answer fails to reveal any place

herein the failure of Radkovich to perform conditions ·ecedent was alleged by appellant as an affirmative de- nse. Nowhere in appellant's six affirmative defenses is .e issue of non-performance of conditions precedent by adkovich even raised in the pleadings. Nor is this atter raised by appellants in their objections to the pro-)sed findings of fact [R. 166]. Appellant suggests .at the matter of performance of conditions precedent : the performance bond cannot be considered as having :en litigated for the reason that there is no finding of ıct with respect to the performance by Radkovich of ıch conditions precedent. There is no allegation by ap- ellant that there was no performance of conditions prece- ent, and if the isues of the performance of conditions ·ecedent was litigated and a finding thereon be needed, ıat portion of finding XVIII [R. 201] which reads: That the Glens Falls Indemnity Company has failed to stablish any of the allegations relied upon as defenses" sufficient. This finding negatives any defenses relied pon by Glens Falls. Although appellee fails to observe here the defense of a failure to perform conditions prece- ent was relied upon by appellant, if such was the case, ıen this portion of finding XVIII effectively disposes of ıch a defense.

C. Radkovich Has a Right of Recovery Upon the Payment Bond.

Appellant's contention that no right of recovery upon ıe payment bond exists for the reason that appellee ıs not alleged any loss or damage is without merit. o give any effect to Rule 14(a) regard that portion hich says that a third party defendant may be brought ı if it is alleged that he *is or may be liable* to the

original defendant it must necessarily follow that it is not necessary to show that the original defendant has already sustained a loss. And this is the rule even though by the existing state law no cause of action would arise until actual payment had been made by the original defendant. *Glens Falls Indemnity Co. v. Atlantic Building Corp.* (C. A. 4th, 1952), 199 F. 2d 60; *McLouth Steel Corp. v. Mesta Machine Co. v. Hartford Accident & Indemnity Co.,* 17 F. R. S. 14a.221, Case 1; *Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Bornemeier,* 13 F. R. D. 146 and cases cited therein.

The payment bond clearly recites that it is a bond and denominates Woolley as principal and Radkovich as obligee with Glens Falls as surety. The promise of the bond is payment of money. Any ambiguities as to whether this is a surety bond or a contract of indemnity against loss or a contract of indemnity against liability will be construed against the surety. *Alberts v. American Casualty Co.* (1948), 88 Cal. App. 2d 891. A payment bond to guarantee the payment for labor and materials which go into a job are generally construed as contracts of indemnity against liability and not as contracts of indemnity against loss only. In *Ceremony v. Drummond* (1918), 37 Cal. App. 446, 448, the court had the problem of determining whether an action would lie upon such a bond before the owner had actually paid the claims of laborers and material men. The court stated in holding the surety liable even before payment by the owner:

> p. 448 "The second point urged—that plaintiff could not maintain an action on the bond until he

had actually satisfied the claims of claimants—viewing the contract of the surety, we think should not be sustained. Contracts of this nature are now generally held to be contracts of indemnity against liability, rather than indemnity against loss sustained and paid."

n view of the interpretation of such contracts as indiated by *Ceremony v. Drummond* (*supra*) and in acordance with the rule that under Rule 14(a) a third arty defendant may be brought in even though it alleged nly that he "*may*" be liable to the original defendant, nd in accordance with the cases on the acceleration of ability under Rule 14(a) it is submitted that Radkovich ad a right to recover upon the payment bond executed y appellant.

. Any Issues Not Raised by the Pleadings Were Litigated So as to Cure the Defects in the Pleadings as Provided in Rule 15(b).

Appellant argues that any issues not raised by the leadings were not litigated so as to cure the defect under ule 15(b). Significantly, appellant does not indicate hich issues he is referring to in this argument. This oint appears in his brief under the general heading that ppellee has failed to state a claim against appellants. his allegation of failure to state a claim was urged by ppellant in his sixth affirmative defense so it cannot e said that this issue was not raised by the pleadings. s to this affirmative defense, the burden of proof was early upon appellant. The finding of fact disposing of is affirmative defense is found in paragraph XVIII R. 201] of the findings of fact. That this finding of

fact is intended to dispose of this affirmative defense is borne out by reference to the Memorandum of Conclusions [R. 117, 127] which Memorandum of Conclusions was available to appellant when the findings of fact and conclusions of law were being prepared. Significantly, no objection to this finding of fact was made by appellant in its Objections to Proposed Findings of Fact and Proposed Conclusions and Judgment [R. 166].

The issue which was raised and which was litigated was that of whether or not Woolley has paid Westinghouse for the materials supplied by Westinghouse, and if not, what if any liability did appellant Glens Falls have to Radkovich because of such failure to pay. Appellee does not admit that the conditions precedent in the performance bond have any application to the payment bond. Were the payment bond alone pleaded it would provide sufficient basis for appellee's recovery against appellant. On the other hand, the failure of Woolley to pay for materials was a failure of performance of the subcontract, for which Radkovich should be allowed to recover on the performance bond as well. In any event, it is clear that two separate bonds were executed, and for two separate and different purposes, and conditioned upon two different things. [R. 49, 50]. Appellant seeks to eliminate the performance bond as a basis of the judgment for the reason that there is no allegation of performance of conditions precedent, although this non-performance of conditions was not urged by appellant as an affirmative defense. Appellant does not spell out in his brief that the issues of non-performance of the conditions precedent of the performance bond are the ones which he argues have not been litigated. If they

have not been litigated it is because appellant did not plead this as an affirmative defense, and not being pleaded such affirmative defenses are waived. Federal Rules of Civil Procedure 12(h). Nor did appellant sustain his burden of proof relative to the failure to state a claim upon the payment bond. Appellant argues that this can afford no basis for the judgment for the reason that no loss or damage was suffered by Radkovich. That this is not the law see the cases cited *supra* (Point I-E) relative to the acceleration of such claims and Rule 14(a) of the Federal Rules of Civil Procedure.

III.

Recovery by Radkovich Can be Predicated Upon the Payment Bond.

Appellant's argument against the payment bond as a basis of the judgment in this matter is that Radkovich did not allege and prove that the loss to Westinghouse was in fact paid. In support of this argument he cites the proposition that the contract between Glens Falls and Radkovich as obligee, which was the payment bond, was in fact a contract of indemnity, and of indemnity against loss only and not against liability. Assuming, but not conceding that it were a contract against loss only, then by the provisions of Rule 14(a) which allows the acceleration of the accrual of a cause of action such as would be the case if this were a contract of indemnity against loss, appellee is still entitled to judgment against Appellant. *Glens Falls Indemnity Co. v. Atlantic Building Corp. (supra); McLouth Steel Corp. v. Mesta Machine Co. v. Hartford Accident & Indemnity Co. (supra); Bill Curphy Co. v. Lincoln Bonding & Ins. Co. v. Borne-*

meier (supra); all cases applying this acceleration where by state law or by the terms of the contract the action had not accrued at the time the third party was brought in. Even by appellant's own interpretation of the payment bond as a contract of indemnity, then it is evident that the judgment could be predicated upon the payment bond.

Opposed to this however, is the position of appellee that the payment bond of appellant was a surety bond and not a contract of indemnity against loss only. This surety bond bound Glens Falls to pay money if Woolley did not. In *Alberts v. American Casualty Co.* 88 Cal. App. 2d 891 (1948) the court was interpreting a contract of indemnity for the purposes of determining whether or not it was a contract of indemnity against loss only or also against liability. On page 899 the court stated in part:

> "If the contract binds the indemnitor to pay money and the payment of the money will prevent harm or injury to the indemnitee it is a contract of indemnity against liability. (42 C. J. S., §2, p. 565). Any obscurity in the language of the contract is to be construed against the party causing the obscurity to exist—in this case the indemnitor. (Civ Code, §1654; 31 C. J. §18, p. 427, and cases cited). The contract is to be liberally construed in favor of the indemnitee (Union Electric Co. v. Lovell Livestock Co., 101 Mont. 450 (54 Pac. 2d 112, 115)), all fair doubts are to be resolved in favor of the indemnitee (Eureka Coal Co. v. Louisville & N. R. R. Co., 219 Ala. 286 (122 So. 169, 171)), and a construction permitting recovery is favored (Massachusetts Bond-

ing & Ins. Co. v. Texas Finance Corp. (Tex. Civ. App.), 258 S. W. 250, 252), but the undertaking of the indemnitor may not be extended by construction or implication beyond the terms of the contract. (Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 454 (188 P. 982), 42 C. J. S. §8, p. 576).

It is submitted that in the present case, the agreement of Glens Falls is to pay, and as such, then by the *Alberts* case, it is an indemnity agreement against liability, and the appellant is bound to pay to prevent harm or injury to Appellee.

Appellant's argument that there is a complete failure of proof and of findings of fact in regard to appellant's liability on the payment bond is without basis other than his misconception that payment by Radkovich is a prerequisite to liability of Glens Falls. As was pointed out above, the law truly is that under Rule 14(a) the liability of Glens Falls on its bond, whether it be considered to be an indemnity bond against loss and damage or whether it be considered to be a surety bond, is accelerated to allow a third party plaintiff to have judgment against the third party defendant upon the showing that the third party defendant is or may be liable to the third party plaintiff. Finding of Fact X supported by Radkovich's Exhibit C, expressly finds that Glens Falls executed the separate payment bond upon which Radkovich brought in Glens Falls as a third party defendant [R. 195]. Finding XI [R. 196] supported by the evidence [R. 232] expressly found that Woolley did not pay Westinghouse for all the material he bought from Westinghouse, leaving the sum of $26,952.01 due owing and unpaid from Woolley

to Westinghouse. This finding, adequately supported by the evidence reveals that Woolley did not fully perform his part of the subcontract, and reveals that he did not pay Westinghouse, nor did he hold Radkovich free and harmless. On the strength of this finding and the evidence which supports it, the court made Conclusion of Law II that Glens Falls was liable to Radkovich for the amounts which Radkovich was liable to Westinghouse. This is substantial justice in this matter. The payment bond running to Radkovich was for his protection in the event that Woolley did not pay for materials or labor. Woolley did not pay for all the materials that he used. On this state of facts, Glens Falls should be liable to Radkovich, and the court so held. The judgment against Glens Falls is based on the Findings X and XI [R. 195, 196] which expressly found the bond to have been executed, and found that Woolley did not pay Westinghouse for all the materials purchased by Woolley. These findings of fact give rise to Conclusion of Law II [R. 201] upon which the judgment against Glens Falls and in favor of Radkovich and Sureties is based.

Barron & Holtzoff states Vol. 2, sec. 1131, p. 831:

> "On appeal, the appellate court does not retry the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. Consequently, an appellant seeking to overthrow the findings has the burden of

presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."

Anderson v. Federal Cartridge Corp. (C. C. A. 8th, 1946), 156 F. 2d 681;

United States v. Foster (C. C. A. 9th, 1941), 123 F. 2d 32.

This appellant has not done. He argues that the Conclusion of Law II [R. 201] is unsupported by the findings of fact and by the evidence. The record, however, supports not only Findings of Fact X and XI [R. 195, 196], but those findings in turn support the Conclusions of Law II [R. 201] upon which judgment against appellant was based. Apparently appellant's entire argument on this point is based on the misconception that payment by Radkovich is a prerequisite to liability of Glens Falls. Further, appellant's interpretation of the law relative to indemnity agreements against loss may have significance in the State courts, it would not even be controlling there in view of the *Alberts* case which clearly indicates that an indemnity contract which provides for payment is in fact an indemnity contract against liability. Interpreting the agreement of Glens Falls most favorably to appellant, the right of action as given by Rule 14(a) accelerates such a claim and matures it so that a judgment may be rendered upon it in a third party action such as the one before the court.

IV.

There Was no Material Alteration of the Subcontract Such as Would Serve to Exonerate Appellant.

Appellant, relying upon Civil Code 2819, and upon its own interpretation of the facts of this case seeks to lift itself by its own bootsraps. First, it becomes necessary for appellant to interpret the facts as constituting a material alteration of the subcontract, then it becomes necessary to interpret the bonds in question here as requiring the obligee, Radkovich, to give notice to Glens Falls. Appellee does not admit that the subcontract between Radkovich and Woolley was altered or modified in any manner whatsoever nor that notice to Glens Falls was required. This the trial court so found. Finding of Fact XVIII [R. 201] reveals that there was no alteration of the subcontract with regard to the method or amounts of payments, and that there were no material changes or modifications of the plans or specifications referred to in the subcontract.

In his argument, appellant has suggested that the performance bond and the payment bond be interpreted as one agreement. This, Appellee does not agree with, nor did the trial court so find. Rather, Appellee contends that each is a separate instrument, given for a distinct purpose, for which a separate premium was charged, and each depend only upon its own terms and conditions without reference to the other bond. If as appellant contends, the two bonds were to be construed together, then appellant's point relative to a material alteration of the subcontract must fail in its entirety. This for the reason that the surety, Glens Falls, *expressly*

waived notice of modification of the contract in its performance bond [R. 51] wherein the performance bond is quoted as reciting in reference to modifications of the contract *"notice of which modifications to the surety being hereby waived . . ."* It has been held that where a surety waives notice of modifications or consents in advance to such modifications or alterations to the contract, that it is not exonerated by modifications or alterations that thereafter occur.

> *Wolf v. Aetna Indemnity Co.* (1912), 163 Cal. 597;
>
> *Roberts v. Security Trust & Savings Bank* (1925), 196 Cal. 557;
>
> *Bowman v. Maryland Casualty Co.* (1928), 88 Cal. App. 481;
>
> *Glens Falls Indem. Co. v. Basich Bros. Const. Co.*, 165 F. 2d 649, cert. den., 68 S. Ct. 1347, 334 U. S. 833, 92 L. Ed. 1760.

Now, if as appellant contends, the two bonds are to be construed together, then Glens Falls has expressly waived notice of the modifications and alterations of the subcontract so as to preclude its exoneration on either bond. On the other hand, as appellee contends, each bond should be construed separately, and if an alteration of the subcontract occurred, the Surety Glens Falls has consented to same.

For still another reason, the argument that there was such a material alteration as would exonerate appellant cannot prevail. In order for such alterations of the principals' subcontract to be effective to work a discharge of the surety, Civil Code 2819 requires that the modi-

fication or alteration be *by some act of the creditor or obligee.* In the present case, the court found that there was no modification of the subcontract. But if the facts did reveal that such a modification did occur, then appellant would have the burden of showing that such alterations of the subcontract were caused by some act of the creditor, Radkovich, or by the provisions of Civil Code 2819, no exoneration would occur. See *Gift v. Ahrnke* (1951), 107 Cal. App. 2d 614, 618, where the court states:

> "The appellant bonding company invokes sections 2819-2821 of the Civil Code as exonerating it. Section 2819 declares that a surety is exonerated 'if by any act of the creditor, without consent of the surety, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.' This by its own terms would be inapplicable when as here, no alteration or change of position occurred 'by any act of the creditor'."

In the case at bar there is no showing that even such minor changes in the subcontract as may have occurred were caused by any act of Radkovich and for this reason Civil Code 2819 afford appellant no defense.

Further, it is the contention of appellee, and the trial court found, that there was no material alteration of the contract. [See Finding of Fact XVIII, R. 201.] The judgment of the trial court gave Woolley judgment for *extras ordered by Radkovich outside the subcontract.* If as appellant argues, the extras were a part of the subcontract there might be some basis for his contention that the subcontract was altered. The findings and evidence

support the judgment that the extras were *outside* the subcontract. Appellee readily admits that the work of the subcontract was performed by Woolley on October 6, 1948. Appellee does not admit that the *subcontract* was in its entirety performed by Woolley at any time. The record is clear and the findings of fact so show that Woolley did not pay Westinghouse for all the materials supplied by Westinghouse to Woolley. This failure of Woolley to pay Westinghouse amounts to a breach of the subcontract by Woolley. The findings of the court were, and they are amply supported by the evidence that any extra work done by Woolley or any extra materials supplied by him were *outside the original subcontract* and did not amount to a material alteration of the subcontract.

Appellant has urged upon the court as an affirmative defense that the subcontract was altered without the consent of the surety. Appellant's burden in establishing such an affirmative defense is to prove the following: (1) that the subcontract was altered (not merely that extra work was done by the subcontractor which was outside the subcontract); (2) that if the subcontract was altered, that such alterations were material; (3) that if the subcontract was altered by material alterations, that such material alterations were made in the subcontract without the consent of the surety, and (4) that if such material alterations of the subcontract were made without the consent of the surety, that the surety was prejudiced thereby.

Roberts v. Security T. & S. Bank (1925), 196 Cal. 557;

Dunne Inv. Co. v. Empire State Surety Co. (1915), 27 Cal. App. 208;

W. P. Fuller & Co. v. Alturas School Dist. (1915), 28 Cal. App. 609;

Bowman v. Maryland Cas. Co. (1928), 88 Cal. App. 481.

Appellee contends that the question of whether or not the subcontract was materially altered is a question of fact, and a finding of the trial court on such issue will not be disturbed on appeal if supported by the evidence, or if any conflict of the evidence is resolved by the trial court in favor of the finding as made.

Turning now to the findings and the evidence we discover that the trial court resolved any conflict in evidence in the following manner [R. 200]:

"XVIII.

"That there is no evidence from which the Court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the Court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the Court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month.

"That there is no evidence that the terms of the subcontract were altered to change the method and amount of payments to Woolley, and there is no evidence that there was any departure from the terms of the subcontract with reference to the method and amount of payments to Woolley.

"That Radkovich did not take control of said subcontract work; that there were no material changes

or modifications of the plans or specifications referred to in said subcontract.

"That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses."

This finding spells out in some detail the court's finding of fact that there was no material alteration of the subcontract and the particulars wherein it was not altered, both in regard to manner of payment, and in regard to the plans and specifications covering the work.

Appellant argues that when he speaks of material alteration of the contract that he refers to alteration without the consent of the surety Glens Falls, and suggests that the record is devoid of any evidence that Glens Falls was notified of or consented to any alteration of the subcontract between Radkovich and Woolley. Appellee contends, as the court expressly found [Finding XVIII, R. 201] that there was no material alteration of the subcontract. But, assuming without admitting, that the subcontract was materially altered, the burden of proving that it was done without the consent of the Surety Glens Falls is upon appellant. And this burden he has not met. Appellant included as a part of its answer as Exhibit "B" the performance bond executed by appellant and Woolley for the benefit of Radkovich [see R. 50-51]. This bond contains an express waiver by appellant Glens Falls of the notice of any modification of the subcontract in the following language:

"Now, therefore, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract and

any extensions thereof that may be granted by the with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made *notice of which modification to the Surety being hereby waived,* then this obligation to be void; otherwise to remain in full force and virtue." (Emphasis added.)

Appellant has advanced argument that the two bonds should be construed together. If so, the above emphasized waiver would serve to constitute an advance consent by the Surety as to each bond to any alterations or modifications of the subcontract. Appellant's dilemma is one of urging on one hand that the contract was materially altered without the consent of appellant, and on the other hand having pleaded as an exhibit to his answer an express waiver of right to notice of any modification. It is a well established principle of law that such advance waiver by a surety constitutes consent to modification of the subcontract and will preclude exoneration of the surety if such modification does subsequently occur.

Blackwood v. McCallum (1922), 187 Cal. 655;

Wolf v. Aetna (supra);

Roberts v. Security T. & S. Bank (supra);

Bowman v. Md. Cas. Co. (supra).

The question of whether or not any modification of the subcontract was material is one of fact and upon the trial court's determination that whatever alteration or modification of the contract as might have occurred was

not material, the appellate court will not reverse in the absence of a showing that such resolution of the conflicting evidence is clearly erroneous. The trial court found that there was *no* alteration of the subcontract. The evidence before the court in regard to changes in the plans and specifications, in regard to the items covered by the subcontract, and in regard to the time and method of payment was in conflict. This conflict of the evidence was resolved in the finding that there was no material alteration of the subcontract and no change in the manner or time of payments. The burden of proving such a material alteration of the subcontract as would exonerate appellant was squarely upon appellant, and if the court was presented insufficient evidence to find in appellant's favor, it is a failure of appellant to meet its burden of proof, of which it cannot complain upon appeal.

B. There Was no Alteration of the Subcontract by Furnishing Materials and Doing Work Not Within the Subcontract.

Conflicting evidence was presented to the trial court relative to four different items, namely: *bell circuits, telephone circuits, closet lights* and *fixtures*. Radkovich contended that they were included in the original subcontract. Woolley, on the other hand, contended that they were extra items for which he should receive extra compensation. Faced with this conflicting evidence, the court found in Finding of Fact XV [R. 198] the following:

> "That the special instance and request of Radkovich Woolley furnished additional labor and materials not required under the prime contract, the subcontract nor under any changes or modifications of said contracts, but which were furnished to be used and were actually used in additions to the structures

> and improvements covered by said contracts. That said labor and materials consisted of the following items, the cost and reasonable value of which are as follows:"

Then follows a listing [R. 198] of the various items together with a figure indicating the reasonable value of the labor and materials involved in each item, together with a finding that no part of the total sum of $8,277.67 had been paid by Radkovich to Woolley. This finding specifically covers each item which appellant urges upon this court constituted an alteration or modification of the subcontract. The issue thus raised by appellant of the defense of material alteration of the contract was effectively disposed of by Finding XV [R. 198] wherein it was specifically found that *all these extras* constituted no part of the subcontract nor of any change or modification to the subcontract. They were extras outside the subcontract, for which Woolley was allowed $8,277.67 in the judgment of the trial court. Appellant urges that a written contract can be altered or modified by an executed oral contract, and with this statement of the law, appellee does not take issue. Appellee does take issue with appellant's contention, however, in its relation of the facts of the case at bar to the law as stated. Whether or not the supply and installation of the extra items constituted a modification of the subcontract or a separate agreement is a question of fact, which fact has been resolved in Findings XV [R. 198] and XVIII [R. 200] to the effect that they did not constitute an alteration of the subcontract. Appellant argues that such additional items required a rerouting and redesigning of the tubing and outlet boxes provided in the original contract. To this argument it need only be observed that all the houses were wired

in the same manner and that if whatever change in tubing that was made constituted a change in the subcontract, it was not deemed by the trial court to be material. Further, the fact that the payments as made did not indicate a distinction between what was covered by the subcontract and what was an outside extra is not conclusive. In fact, the court found that the value of such extras was $8,277.67 and that Woolley had not been paid any of this amount and gave judgment in the action for Woolley in that amount. This finding effectively negatives appellant's argument that the extras were not segregated for purposes of payment. Until the court determined that they were extras outside the contract, Radkovich had contended that they were a part of the original subcontract. The court's finding that they were no part of the subcontract and that Woolley had not been paid for them resolved the factual differences between Woolley and Radkovich in favor of Woolley and the judgment for $8,277.67 for these extras established that any payments made by Radkovich did not cover those items.

Appellant contends that Radkovich should be estopped to deny the validity of the oral contract for the extras, or as he puts it for the oral modification to the subcontract. The trial court in giving judgment for Woolley effectively protected Woolley's rights to be paid for the extra work and material he performed and supplied outside the subcontract. Radkovich is not at this late date being permitted to contend that he did not order the extras, nor is he being permitted to avoid payment therefor, inasmuch as judgment in favor of Woolley was given for the amount of these extras. The fact that Radkovich erroneously contended that these extras were a part of the subcontract cannot now be used to estop the trial

court from finding as it did that they were extras and were not a part of the subcontract. Appellant would seek to use Radkovich's erroneous contentions to estop the trial court from holding that such extras were not a part of the subcontract. There is no doubt but that Woolley performed extra work. This the court found and for this it gave him judgment. But the court did not find that the extras for which Woolley was paid were modifications of the subcontract. Nor is there any evidence upon which such a finding can be made. An appellant who attacks the findings of a trial court has the burden of showing that the findings are not supported by the evidence, or that there is a preponderance of evidence in favor of some other finding. Appellant has not been able to point to any evidence which would support a finding that these extras constituted a modification of the subcontract.

In the absence of such evidence that the extras were modifications of the subcontract, the question of their materiality is academic. No doubt the value of the extras in amount equalled in excess of 10% of the subcontract price. But where the evidence supports the finding that such extras were not a part of the subcontract or an alteration thereof, the extent of the extras in relation to the subcontract has no relevancy to the question of whether or not the subcontract was *materially* altered. Appellant had the burden of proving that the contract was altered before the question of whether or not such alterations were material would ever arise. Failing to prove the contract was altered at all, the question of the materiality never arises.

Appellant suggests that Radkovich relied upon economic coercion to compel Woolley to complete his performance

of the subcontract (Br. 81). There is no doubt but that Woolley was in great financial distress, otherwise this entire lawsuit might not have occurred. Regardless of this, Radkovich's insistence was only within his prerogatives as general contractor to insist that Woolley perform his contract or Radkovich would secure the services of another subcontractor. It should be noted that the subcontract called for a completion date by Woolley of April 15, 1948 [R. 43] and that this purported economic coercion occurred on June 14, 1948, some sixty days after Woolley had agreed to complete the subcontract, and at a time when Woolley had walked off the job refusing to continue performance. Appellants contend that this was a lack of good faith on Radkovich's part with reference to Glens Falls. It is submitted that had not Radkovich pursuaded Woolley to return to the job, that Glens Falls would have been liable for completion of the *work* under its performance bond as well as for payment of materials under the payment bond, and the efforts of Radkovich in causing Woolley to return to the job were directly for the benefit of appellant for which it should not complain.

Appellant's quotation from *First Congregational Church v. Lowery* (1917), 175 Cal. 124, 125, 126, 165 Pac. 440, taken out of context would lead this learned court to believe that the finding of the court was that the alterations were *not material* and that nevertheless the surety was exonerated. This misinterpretation of the case cannot be allowed to go unchallenged. What the *Lowery* case really held was that the alterations *were material* within the meaning of existing decisions and for this reason reversed the trial court which had found the alterations not to be material. It has been held also in the case of premature payments, that such do not discharge a compen-

sated surety unless surety is prejudiced by same. (*Dunne Inv. Co. v. Empire State Surety Co.* (1915), 27 Cal. App. 208, 150 Pac. 405, 411.) Further it is well established that permitted alterations will not release the surety. (*Bowman v. Md. Cas. Co.* (1928), 88 Cal. App. 481, 263 Pac. 826.) Where a surety consents to the alteration of the contract it cannot complain. (*Smith v. Thomsen* (1935), 8 Cal. App. 2d 603, 48 P. 2d 102.) Further, where a contract provides for changes, the surety is not released by such changes. (*Simpson v. Bergman* (1932), 125 Cal. App. 1, 13 P. 2d 531.) In short, the rule of *strictissimus juris* as it formerly applied to gratuitous sureties is not applicable in California to compensated sureties. (*Bond v. Holloway* (1920), 45 Cal. App. 634, 188 Pac. 577; *Hunstock v. Royal Securities Corp.* (1921), 51 Cal. App. 769, 197 Pac. 963. See also, 12 A. L. R. 382.)

C. There Were no Premature Payments Under the Subcontract Such as Would Exonerate Appellant.

Appellant distorts the court's findings of fact to insist for its own purposes that the $4,000 loaned to Woolley by Radkovich was in fact a premature payment. Radkovich testified that it was a loan [R. 262] including the arrangements by which the loan should be repaid. Woolley testified that it was a loan [R. 428]. There is absolutely no other evidence, testimonial or documentary, that contradicts this corroborated testimony that the $4,000 was a loan by Radkovich to Woolley. Further, the record [R. 262] reveals that Radkovich repaid himself from a subsequent payment as agreed. Had this been a payment and not a loan, the money would have become Woolley's and Radkovich could not have offset the $4,000 against the latter payment. In the minds of the parties to the trans-

action, as evidenced by their testimony and by their actions this was clearly a loan.

Both Woolley [R. 428] and Radkovich [R. 262] testified that Radkovich charged Woolley $500 for making this loan. Appellant now seeks to twist this admitted $500 loan charge into becoming a reduction of $500 in the subcontract price. There is absolutely no evidence to support appellant's contention that this was a reduction in the subcontract price. Rather, this is the effort of appellant to try to subvert the true intentions of Radkovich and Woolley so as to release appellant from its just obligation, which it entered for compensation, and for which it received and retained the premium paid. The finding of fact [Finding XVII, R. 200] on this point is that $4,000 was loaned to Woolley by Radkovich for which loan Woolley promised to and did pay to Radkovich the sum of $500 as interest. The same finding of fact explicitly negates the possibility that this was a premature payment. And this finding is supported by the evidence [R. 262, 428]. In the face of this express finding of fact supported by the only evidence on the subject, appellant now argues that this was a premature payment. Barron & Holtzoff, Federal Practice and Procedure, Volume 2, page 831, states:

> "On appeal, the appellate court does not retry the case. The findings of fact are presumptively correct and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."

It is submitted, that appellant is here seeking to overthrow a finding of fact that is adequately supported by the evidence and that the burden of presenting a record that shows that the weight of the evidence does not support this finding is upon the appellant seeking to overthrow such finding of fact. Appellant has not met his burden of showing that the evidence does not support the finding of fact. On such a state of the record the findings of fact should not be disturbed. The trial court found [Finding of Fact XVII, R. 200] that Radkovich loaned Woolley $4,000 and charged him the sum of $500 interest. This finding of fact is supported by the evidence [R. 262, 428]. Appellant's arguments to the contrary, however, are not supported in any manner whatsoever by the evidence in the record. Where an appellant seeks to overthrow a finding of fact the burden is upon him to show that the evidence compelled a finding in his favor. (*Anderson v. Fed. Cartridge Corp.* (C. C. A. 8th, 1946), 156 F. 2d 681; *United States v. Foster* (C. C. A. 9th, 1941), 123 F. 2d 32; *Grace Bros. v. C. I. R.* (C. A. 9th, 1949), 173 F. 2d 170.) Further, upon appeal the presumption is that the finding of fact is correct and will not be set aside unless clearly against the weight of the evidence. (*Wingate v. Bercut* (C. C. A. 9th, 1945), 146 F. 2d 725; *Coleman v. United States* (C. A. D. C., 1949), 176 F. 2d 469; *Seven-Up v. Cheer-Up Sales Co. of St. Louis, Mo.* (C. C. A. 8th, 1945), 148 F. 2d 909, cert. den., 66 S. Ct. 32, 326 U. S. 727, 90 L. Ed. 431.)

Appellant next seeks, by juggling figures, to correspond with what appellant has assumed the facts to be, to demonstrate that Woolley was overpaid by Radkovich as of the second estimate. Contrary to this assumed fact is

the Finding of Fact XVIII [R. 200] which reads in part as follows:

> "That there is no evidence from which the Court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the Court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the Court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month.
>
> "That there is no evidence that the terms of the subcontract were altered to change the method and amount of payments to Woolley, and there is no evidence that there was any departure from the terms of the subcontract with reference to the method and amount of payments to Woolley . . ."

The court's attention is directed to the fact that the burden of proving the defenses which appellant advances as his second and fourth affirmative defenses is squarely upon appellant. As the trial court found [Finding of Fact XVIII, R. 200, 201] there was insufficient evidence from which the court could ascertain whether or not any premature payments had been made, the appellant has failed in his burden of proof and cannot now urge upon appeal that the court erred in finding as it did. The method and amounts of payments to Woolley were spelled out in the subcontract [R. 45] and in Article 16 of the prime contract [Radkovich Ex. B]. By these provisions the general contractor is given considerable discretion in regard to the amount of payments. By the provisions of Article 16 of the principal contract the general contractor

was to be paid as the work progressed on monthly estimates made and approved by the contracting officer. In preparing these estimates the material delivered on the site and preparatory work was to be taken into consideration. The consideration was to have been paid to the subcontractor upon invoices and vouchers surrendered therefor in such manner and form as should be prescribed by the contractor [R. 45]. There is nowhere spelled out in the subcontract or in any of the provisions of the general contract which have application to the payment by the principal contractor to the subcontractor what percentage should be paid by the principal contractor to the subcontractor in any one month. Nor is it spelled out that the principal contractor was obligated to make his estimates in one manner rather than another. Payment to the subcontractor on a monthly basis determined by the percentage of work done and materials supplied by the subcontractor, is no more prescribed by the subcontract than was payment on a unit basis of a certain number of dollars per house. The progress of the subcontractor was just as well measured by the number of units completely finished in reference to the total number of units to be constructed as by any other means of measurement.

Appellant next cites *Pacific Coast Engineering v. Detroit Fidelity and Surety Co.* (1931), 214 Cal. 384, as authority that what occurred in the instant case amounts to a premature payment by Radkovich to Woolley such as would exonerate appellant surety. The *Pacific Coast* case is distinguishable on its facts however, as in that case the plaintiff was *relying upon the $1,000* he had advanced to the contractor, not as a loan but as a payment under the contract. It is to be noted that in that

case the bond sued upon was the faithful performance bond where the court set down the following rule (p. 395):

> "That if the *premature payment* made by the obligee without the knowledge or consent of the surety *is one upon which the plaintiff is relying* and is dependent for a recovery against the surety, then the payment has materially altered the principal's obligation, the injury to the surety is established, and the surety is exonerated by virtue of the provisions of section 2819 of the Civil Code."

(P. 396):

> "In the present case, as we have seen, the plaintiff is relying and basing his right to recovery upon the $1,000 payment to Worswick, which the plaintiff contends was made within the contract, and therefore premature, and the trial court so found." (Emphasis added.)

Clearly, where as in the present case, the trial court found that the $4,000 was *a loan,* and where the evidence *supports such a finding,* and where the obligee is *not relying upon such loan* as a premature payment, then the rule of the *Pacific Coast* case can have no application. In the present case, Radkovich and Woolley treated the transaction as a loan, and nowhere is it indicated that Radkovich was relying upon this $4,000 as a premature payment under the contract. Neither Radkovich nor Woolley treated the $4,000 as a payment within the subcontract. Appellant cannot reconstruct the intentions of Radkovich and Woolley to defeat its liability.

See also:

Bateman v. Mapel (1904), 145 Cal. 241.

D. Any Change in the Method of Payment Did Not Amount to a Material Alteration of the Subcontract.

Appellant contends that the method of calculating progress payments was changed and that this change constituted an alteration of the subcontract sufficient to release appellant.

Finding of Fact XVIII [R. 201] reveals that upon a consideration of the evidence before it, that it found that the subcontract was *not* altered to change the methods and amount of payment and that there was no departure from the terms of the subcontract in regard to the method and amount of payments to Woolley [R. 201]. This finding of fact is based upon the testimony of Woolley and of Radkovich together with an interpretation of what the subcontract provided in this regard. The subcontract provides in part [R. 45]:

> "The aforementioned consideration shall be paid to the sub-contractor upon invoices and vouchers surrendered therefor, in such manner and form as shall be prescribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion, affecting the generalities of the references to the principal contract and the agreements of the sub-contractor hereunder to be bound thereby, payments shall be made by the contractor to the sub-contractor only in accordance with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the subcontractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of Article 16."

Clearly this portion of the subcontract allows the principal contractor, Radkovich to determine what manner and form of vouchers he shall require as a basis for calculating payments to Woolley. At the beginning of the contract, before any houses were completed, vouchers showing the material on hand and the labor done were required [R. 426]. Later in the contract when units were being completed daily, the amount of progress could be ascertained by relating the number of units completed to the total contract [R. 430]. On this basis calculations as to progress made which served as a basis for payment to Woolley could just as well be made. The court's finding that the method and amount of progress payments was not changed is consistent with the provision of the subcontract and Article 16 of the principal contract. Further, appellant cites no portion of the record which would support its contention that the method of calculating the progress payments was changed. The burden upon appellant in this appeal is to demonstrate to the appellate court that the findings of fact are clearly not supported by the evidence. This appellant has not done, and it is submitted, cannot do by reference to the record on appeal. In the absence of such a clear showing that the findings are not supported by the evidence, the appellate court will not overthrow the trial court's findings of fact on any issue.

E. The Findings of Fact in Regard to Alteration of the Subcontract Are Adequate.

Appellant's argument that there were no findings of fact on the substantial question of alteration of the subcontract requires no more than a reference to the record to impeach it. The following tabulation demonstrates appellee's point:

APPELLANT CONTENDS	THE RECORD SHOWS
1. That additional materials and labor were added to the subcontract.	1. Finding of Fact [R. 198] expressly fi that such additional terials and labor w "not required under prime contract, the s contract, nor under changes or modificati of said contracts." T were *extras*.
2. That the subcontract price was reduced by $500.	2. Finding of Fact X [R. 200] that this an interest payme See also [R. 262, 42
3. That Woolley was paid a substantial sum of money before it was earned.	3. Finding of Fact XV [R. 200] "there is evidence from which Court can ascert whether in one mo Woolley was paid m or less than was due for that partic month'.'
4. That the method of payment was changed.	4. Finding of Fact XV [R. 201] "there is evidence that there any departure from terms of the subc tract with reference the method and amo of payments to W ley."

This reference to the record reveals that the contentions of appellant are not supported by the record. There were adequate findings on all the points relied upon by the appellant as alterations of the subcontract. All these matters were relied upon by appellant as affirmative defenses, and as affirmative defenses the burden of proof was upon appellant. If there was insufficient evidence upon which to make a finding upon a matter concerned in an affirmative defense, it is a failure of the appellant to sustain his burden of proof. For his own failure in this regard he should not now be heard to complain upon appeal. Barron & Holtzoff, Vol. 2, sec. 1133, p. 834 states:

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law. The mere fact that on the same evidence the appellant count might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence *de novo.*
>
> "In considering whether trial Court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which reasonably may be drawn from the evidence."

That the appellees must be given the benefit of all inferences in favor of the findings of fact and that the court on appeal cannot set aside the findings unless clearly

erroneous see *United States v. Ore. State Med. S*
(1951), 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 928.

Appellant's objection that there is no finding in reg
to the alteration by method of payment is effectively r
by reference to Finding of Fact XVIII which finds s
cifically on the exact point of material alteration of t
subcontract. [R. 201]. Where the proof was insuffici
for the court to make a finding of fact on an issue rais
as an affirmative defense, such failure of proof is a fa
ure of the appellant and it should not be permitted
take advantage of its own failure of proof to set asi
the judgment. In the absence of a finding of fact, t
appellate court should not pass on a controverted issu
(*Hazeltine Corp. v. Crosley Corp.* (C. C. A. 3rd, 1942
131 F. 2d 34.)

It has been held that findings of fact are sufficient
they support the ultimate conclusion. The trial court
not required to make findings on all the facts present
or to make evidentiary findings. (*Norwich Union Indem*
Co. v. Haas (C. A. 7th, 1950), 179 F. 2d 827.) Thu
where, as in the present case, the court found [Finding
of Fact XVIII, R. 201] that there was no evidence o
change of method of or amount of payment and there
were no material changes or modifications in the plans
or specification, such finding is one of ultimate fact and
adequate to support Conclusion of Law II [R. 201].

V.

Judgment as Based on Performance Bond.

Although appellee contends that the judgment is based primarily upon the payment bond and not upon the performance bond, certain contentions of appellant in regard to the performance bond cannot be allowed to go unchallenged. Appellant cites Findings of Fact XIII [R. 197] and XVI [R. 199] as holding that Woolley did fully perform the subcontract. Neither of these findings so states. In fact, the court had this very question brought to its attention during the time the findings of fact were being prepared by the appellant's objections to the proposed findings of fact, and by the letter of counsel for appellee relative to this very point [R. 166, 184]. Both Findings of Facts XIII and XVI refer to the completion by Woolley of the *"subcontract work."* This is a far cry from holding that Woolley fully performed the subcontract. Full performance included the payment to Westinghouse in full. This Woolley did not do as the court found in Finding of Fact XI [R. 196], which fact even appellant cannot refute. In the Court's Memorandum of Conclusions [R. 97] the court pointed out that it was conceded at the trial that the amount now due Westinghouse is the sum of $26,952.01. The stipulation by counsel for appellant and counsel for Woolley that this amount was not paid by Woolley to Westinghouse and was due and owing is to be found in the record, page 232. This stipulation demonstrates that Woolley did not perform the subcontract in its entirety for admittedly he did not

pay Westinghouse in full. Thus the finding of the court is supported by the evidence, especially in view of the stipulations of counsel that Woolley did not pay Westinghouse in full for the materials supplied by Westinghouse. Thus it may be seen that Conclusion of Law II [R. 201] is supported by the findings of fact and the evidence insofar as it relates to the peformance bond.

VI.

Compliance With Conditions Precedent as Affecting Recovery Upon Performance Bond.

Appellant next contends that appellee's recovery cannot be predicated upon the performance bond because it is argued Radkovich did not comply with express conditions precedent in that bond. This matter was not in issue in the trial. Appellant in all his seven affirmative defenses did not once even mention the word condition precedent. Such matters are the subject of an affirmative defense and if not pleaded are waived. (*Std. Oil Co. v. Houser* (1950), 101 Cal. App. 2d 481, and cases therein cited; *Jack Mann Chevrolet Co. v. Associates Inv. Co.* (C. C. A. 6th, 1942), 125 F. 2d 778; *State Farm Mut. Auto. Ins. Co. v. Koval* (C. C. A. 10th, 1944), 146 F. 2d 118). See also Federal Rules of Civil Proceedure 12(h) providing that affirmative defenses not raised by answer are deemed waived and see *Phillips v. Baker* (C. C. A. 9th, 1941), 121 F. 2d 752, certiorari denied, 61 S. Ct. 301, 314 U. S. 688, 86 L. Ed. 551.

Appellant next refers to his own arguments and assumptions as though they were facts and urges that there were changes in performance, contract price, and method

of payment. These contentions of appellant are effectively negated by the express finding of fact on these issues [Finding of Fact XVIII, R. 200, 201] and by the record of the evidence in support of such findings.

Appellant cites *Union Indemnity v. Lang* (C. C. A. 9, 1934), 71 F. 2d 901 and *Schwab v. Bridge* (1915), 27 Cal. App. 204 for the proposition that appellant should be exonerated because appellee did not give adequate notice to appellant. *Schwab v. Bridge* was decided before the changes wrought in the law of suretyship in California in 1939. One of the distinctions that existed before that time was that a guarantor was primarily liable on his contract of guaranty while a surety was only secondarily liable. In 1939 the distinction was abolished. Today, by the provisions of Civil Code 2807, a surety is liable to the creditor immediately upon the default of the principal and without demand or notice.

As to the failure of Radkovich to notify Glens Falls of Woolley's financial condition and ability to perform the contract, this is the very thing that appellant Glens Falls guaranteed to Radkovich, with notice to which appellant is charged. *Glens Falls Indemnity Co. v. Basich Bros. Const. Co.* (1948), 165 F. 2d 649, 652; *Sherman v. American Surety Co.* (1918), 178 Cal. 286, 173 Pac. 161.

It should be noted that what Radkovich and his sureties seek in this case is not further performance of the subcontract work by Woolley or damages for non-performance of the work under the subcontract, but is payment under the payment bond for sums for which they have been held liable and have now paid because of Woolley's failure to pay Westinghouse. Appellee's judgment

could have been based upon the payment bond alone. It could also have been predicated upon the performance bond, for as part of Woolley's performance of the subcontract, he was obligated to pay for the material supplied by Westinghouse and incorporated into the job.

VII.

Condition Precedent of Performance of Subcontract.

Appellant has not presented the question of the performance of the subcontract by Radkovich as an affirmative defense. Not being pleaded, such affirmative defenses are waived. (See *supra* part VI). Appellant next suggests that the burden of proving that Woolley was paid in accordance with the contract was upon appellee. Nothing could be farther from the law. Appellants have pleaded premature payments and material alteration of the subcontract as affirmative defenses. [See Second and Fourth Affirmative Defenses, R. 38, 39]. The burden of proving these affirmative defenses is upon appellant. By the Finding of Fact XVIII [R. 200, 201] that there was insufficient evidence to show that Radkovich paid Woolley more in any one month than he was entitled to, it is evident that appellants failed to meet their burden of proof and now seek to affix this failure to meet their own burden of proof upon appellees. Further, such condition has no application to the payment bond, which could have been the basis of the trial court's decision.

VIII.

Finding of Fact XVIII Is Supported by the Evidence.

The best that can be said of appellant's argument that Finding of Fact XVIII is not supported by the evidence is that the evidence was to some degree conflicting. This conflict of the evidence has been resolved by the trial court in the manner set forth in Finding of Fact XVIII. Where conflicting evidence has been resolved by the trial court the appellate court will not set aside the trial court's findings unless clearly against the weight of the evidence. (*Paramount Pest Control Service v. Brewer,* (C. A. 9th 1949), 177 F. 2d 564). And the burden of showing that such findings are opposed to the weight of the evidence is upon an appellant who seeks to overthrow the findings of fact. (*Anderson v. Federal Cartridge Corp.* (C. C. A. 8th 1946), 156 F. 2d 681). The appellate court takes the view of the evidence most favorable to the appellee. (*Paramount Pest Control Service v. Brewer* (C. A. 9th 1949), 177 F. 2d 564). As to the four alleged alterations of the subcontract, the court expressly found against appellant that the subcontract was not altered by extra materials [Finding XV, R. 198]; that the $500 was an interest charge and not a reduction in contract price [Finding XVII, R. 200]; that there were no premature payments [Finding XVIII, R. 200]; and that the method of payment was not altered [Finding XVIII, R. 201]. The burden of proving these defenses was on appellant which burden appellant has not sustained.

As to the defense of failure to state a claim the court in its Memorandum of Conclusions [R. 127] expressly indicated its opinion that the Radkovich cross-claim did state a claim against the appellant upon which relief could be granted. Finding of Fact XVIII effectively disposed of this affirmative defense by the finding that Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses.

IX.

Construing Payment Bond With Performance Bond.

Finding of Fact X [R. 196] indicates that two different bonds were written. The memorandum of Conclusions [R. 115] indicates that the court's opinion was that there were no such conditions in the payment bond as were in the performance bond. [R. 49]. This same Memorandum of Conclusions [R. 116] indicates that the court considered the two bonds to be separate instruments and not to be construed together. Also, the subcontract itself provides for two separate bonds for two separate purposes [R. 45, 46].

The reason for two bonds is obvious. One is to assure Radkovich that Woolley would perform the contract or that if he failed Glens Falls would cause the work to be done or would pay Radkovich. The other bond, the payment bond, is for Radkovich's protection in the event that Woolley did complete the subcontract work but failed to pay material suppliers, as he did in this case. Because

it was a United States government job, and because a Miller Act bond was required and was executed, the suppliers of Woolley could, as Westinghouse did, enforce payment by Radkovich and his sureties. To protect himself and his sureties, Radkovich required the payment bond.

Also, the reasons for the conditions in the performance bond, and the absence of conditions in the payment bond are equally obvious. What Glens Falls guaranteed by the performance bond was the performance of the work of the subcontract by Woolley. This subcontract being between Radkovich the obligee on the bond and Woolley, the principal, it is obvious that Radkovich had it in his power to increase the surety's burden. Thus the conditions were imposed in the performance bond in order to assure Glens Falls that Radkovich would not be able to increase its burden by any action of Radkovich's. The payment bond on the other hand, guaranteed Woolley's performance to third parties, his materials suppliers such as Westinghouse. As to this payment by Woolley to these third parties, Radkovich's activities could have no effect. Thus no conditions relating to Radkovich were imposed upon the obligee, Radkovich in the payment bond.

In California it has been held that where two separate bonds are given that the conditions of one will not be incorporated into the other bond so as to preclude recovery on that bond.

> *Maryland Casualty Co. v. Shafer* (1922), 57 Cal. App. 580;

Summerbell v. Weller (1930), 110 Cal. App. 406;

Lamson Co. Inc. v. Jones et al. (1933), 134 Cal. App. 89.

Apparently, appellant did not contemplate that the two bonds should be construed together or that the conditions of the performance bond, otherwise he would have pleaded this as an affirmative defense, which he did not do.

X.

The Trial Court's Judgment Against Glens Falls Is Supported by the Record.

Apparently abandoning his arguments that the items contained in Finding of Fact XV [R. 198] are included in the subcontract, appellant argues that it was error for the court to give judgment against appellant for items outside the subcontract. This is a misconception of the judgment.

Paragraph I of the judgment gave Westinghouse judgment against Radkovich and his sureties for certain sums of money [R. 201]. Paragraph II of the judgment gave Radkovich and his sureties judgment in like amount against Woolley and Glens Falls [R. 201]. Were the judgment to stop here, there would be some merit in appellant's contentions. But paragraph III of the judgment gave judgment to Woolley and Glens Falls against Radkovich and his sureties for *$15,249.69* [R. 202], which sum includes all the extras found by the court to be outside the subcontract in Finding of Fact XV, together with *$6,264.16* found by the court to be due to Woolley [Find-

ing of Fact XIV, R. 198] and the sum of *$107.86* due to Woolley for replacement of units damaged by faulty construction by Radkovich [R. 199].

Thus it may be seen that Woolley and Glens Falls got judgment as an offset against the judgment rendered in favor of Radkovich for all the extra materials and labor which Woolley supplied, so the net effect is that Glens Falls is not being charged for items which were not supplied under the subcontract, as for these items judgment was given for Woolley and Glens Falls. In addition, paragraph IV [R. 202] of the judgment gave Woolley damages for some delay caused by Radkovich in the sum of $949.22 and expressly gave Glens Falls the right to apply this amount to diminish the amount if any paid by it under the judgment. Clearly both Woolley and Glens Falls were given judgment for all that the court found them entitled to, so there is no error in the judgment in this request.

Conclusion.

The District Court had jurisdiction to hear and decide all the issues presented in this entire controversy. The jurisdiction over the Westinghouse action is based upon Federal statute. The cross-claim or third party claim of Radkovich is clearly ancillary to the principal action and thus within the jurisdiction of the District Court. The procedure of bringing in such third party defendants as appellant is expressly provided by Rule 14(a) of the Federal Rules of Civil Procedure.

The findings of fact made by the trial court are adequate as ultimate findings of fact and are supported by the evidence. Appellant did not meet its burden of proof as to its affirmative defenses, and on this appeal has failed to demonstrate that the findings of fact were clearly erroneous or against the weight of the evidence. The judgment should be affirmed.

Respectfully submitted,

Anderson, McPharlin & Conners,

By Kenneth E. Lewis,

Wm. Radkovich Company, Inc., a Corporation, United Pacific Insurance Company, a Corporation, General Casualty Company of America, a Corporation, Excess Insurance Company of America, a Corporation, Manufacturers' Casualty Insurance Company, a Corporation, Appellees.